SUPREME COURT, U.S.
06137 AUG 13 2007

No. 06-

IN THE

Supreme Court of the United States

ELISA K. ROBINSON and GEORGE F. ROBINSON,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a so-called "implied consent" exception to the Fourth Amendment authorized Officer Cox's warrantless entry into the Robinsons' curtilage that was beyond a direct approach to their well-lit and accessible front door while he was purposefully engaged in a search for confirmation of suspected illegal activity occurring in the Robinsons' backyard?

Whether the Supreme Court of Virginia violated the applicable standard of review and, accordingly, the Robinsons' procedural due process rights when it relied upon an inference that Officer Cox ~~had both~~ probable cause *and* exigent circumstances *before* he crossed the privacy line into a constitutionally protected area, even though the Supreme Court of Virginia corrected the trial court's legal error regarding the location of that privacy line?

Whether Officer Cox unlawfully created the exigent circumstances relied upon to justify his entry into the Robinsons' backyard, which area all courts have determined was constitutionally protected by the Robinsons' reasonable expectation of privacy?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following identifies the parties appearing here and before the Supreme Court of Virginia.

This consolidated petition for writ of certiorari joins for review the cases of George F. Robinson and his ex-wife, Elisa K. Robinson, now Elisa Christian Kelly, both defendants below. The prosecuting party is the Commonwealth of Virginia.

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OPINIONS BELOW

The opinion of the Supreme Court of Virginia, which consolidated these cases for its consideration, is reported at 639 S.E.2d 217 (Va. 2007), and is reprinted in the Appendix to the Petition ("App") at 1a-25a. The *en banc* Court of Appeals of Virginia's opinion is reported at 47 Va. App. 533, 625 S.E.2d 651 (2006), and is reprinted at App. 26a-70a.

STATEMENT OF JURISDICTION

The Supreme Court of Virginia entered judgment on January 12, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

[Are reproduced in Appendix I to this Petition]

STATEMENT OF THE CASE

Standard of Review

When reviewing a Fourth Amendment question on appeal, this Court must give deference to the trial court's historical facts, but the application of the law to those facts is reviewed *de novo*. *See Ornelas v. United States*, 517 U.S. 690, 696-97 (1996) ("'The historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the relevant statutory or constitutional standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.'" quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)) (brackets omitted).

In this case, the historical facts are that a police officer, without a warrant, entered the Robinsons' private property at 11:00 p.m. and then penetrated the curtilage of the Robinsons' home beyond a direct approach to the well-lit and accessible front door (the "Garage Area") for the articulated and objective purpose of establishing probable cause, identifying his suspects, finding out their age, seeing if the bottles that they were holding contained alcohol, and causing his surprised suspects to "scatter" like "cockroaches." It is for this Court to decide whether these facts constitute a violation of the Fourth Amendment.

Factual Background

Early in the evening on Friday, August 16, 2002, the Albemarle County Police Department received three calls regarding a possible underage drinking party at the primary residence of George F. Robinson and his then-wife, Elisa K. Robinson. (App. at 27a, 132a.; JA at 104, 109-10, 154, 160.) In response to these calls, at least five police officers with the Albemarle County Police Department rendezvoused at approximately 10:30 p.m. to develop a plan of action. (App. at 133a; JA at 128-29.) The officers decided that Officer Cox would go alone to the house in his cruiser to investigate while all other units held their positions approximately one-half mile away, awaiting information from Officer Cox. (App. at 133a; JA at 111.) Officer Cox understood that his job was to investigate whether there was underage drinking at the alleged party at the Robinsons' home. (App. at 132a.; JA at 129.)

As Officer Cox approached the Robinsons' home at approximately 11:00 p.m., he observed ten to twenty cars parked along the street on either side of the driveway entrance to the house. (App. at 3a; App. at 132a.; JA at 113.) When Officer Cox arrived at the driveway entrance, he observed two or three additional vehicles parked off to the left side of the circular driveway in front of the house. (App. at 3a; App. at 132a.; JA at 113.) Officer Cox believed a party was occurring, radioed the other officers, and directed them to come to the house. (App. at 3a; App at 133a.; JA at 114.)

Officer Cox then turned his police car into the Robinsons' driveway. (App. at 132a.; JA at 114.) Once there, Officer Cox could see the Robinsons' front yard, the front porch and front door of the house, and the house itself. (App. at 3a; App. at 133a.; JA at 130.) Floodlights above the front door were illuminated (App. at 133a.; JA at 155), the front door was accessible (App. at 133a.; JA at 132), and lights lining the walkway to the front door were turned on. (App. at 133a.; JA at 158.) Officer Cox did not see any people in the front yard or any evidence of alcohol in the front yard or the driveway.

(App. at 132a-133a; JA at 131.) The house did not have a side door, and Officer Cox did not see any signs inviting him or anyone else to the back of the property. (App. at 133a; JA at 130, 155.) Officer Cox noticed that there was room to pull his cruiser into the circular driveway in front of the house (App. at 4a; App. at 133a; JA at 131), but he could not see most of the driveway curving to his right, the garage door, the area outside of the garage door, or the backyard. (App. at 133a; JA at 130.)

Instead of stopping his progression, waiting for the other officers, parking in the circular driveway, or proceeding to the front door of the Robinsons' home to talk to its residents, Officer Cox drove his cruiser with headlights on around the curve in the driveway towards the side and back of the Robinsons' home. (App. at 4a; App. at 132a; JA at 132.) Officer Cox's objective as he did this was clear—he was searching for evidence to establish probable cause. (App. at 132a; JA at 144.)

As Officer Cox proceeded around the curve in the driveway, he still could not see the garage, the area just outside of the garage, or the backyard. (App. at 132a-133a; JA at 134.) From this position, Officer Cox did see several more cars parked along the right side of the driveway and several more parked in the area immediately outside of the garage. (App. at 132a; JA at 116, 117, 119, 134-35.) Officer Cox continued his investigation by driving up the Robinsons' driveway, and he eventually entered an area that he could not see when he first entered the Robinsons' driveway. (App. at 132a-133a; JA at 217.)

At some point, Officer Cox saw what he believed to be two people in the backyard of the Robinsons' home. These people were seven to ten yards into the Robinsons' backyard and on the other side of some vehicles and a pine tree. (App. at 4a; App. at 132a-133a; JA at 136-37.) When he first saw these people, he could not identify their age or anything that they were holding. (App. at 132a; JA at 135.) Watching them as he continued his progression, Officer Cox observed that these two people standing in the Robinsons' backyard appeared to him to be juveniles holding Corona beer bottles. (App. at 132a; JA at 118-19.)

Officer Cox admitted that his recollection of his location in the Robinsons' driveway when he saw what he determined to be juveniles in the Robinsons' backyard changed over time.[1] (JA at 136.) The acknowledged reason for his uncertainty was that Officer Cox was not paying any attention to where he was on the driveway because he was solely focused on the objects illuminated by his headlights, *i.e.*, the suspected underage drinkers in the Robinsons' backyard. (JA at 147.) Officer Cox's articulated and objective purpose, after all, was to investigate reports of underage drinking and to "establish probable cause." (App. at 132a; JA at 144.) He wanted to identify his suspects, to find out their age, and to see if the bottles they were holding contained alcohol. (JA at 146.)

While still proceeding up the Robinsons' driveway, Officer Cox got close enough to his suspects to recognize that they had not yet seen him approaching. (JA at 137-38.) But still Officer Cox did not stop his progression, even though he admitted that he could have stopped at that point and gone to the front door. (JA at 133.)

After some period of time, during which Officer Cox continued his progression beyond the "bush" and the walkway to the front door of the Robinsons' home (*see, e.g.*, JA at 137-38, 146-47, 149-50), the people he was watching saw Officer Cox, looked toward the house, yelled "cops," dropped what they were holding, and ran away from him. (App. at 132a; JA at 119-20.)

As noted by both the *en banc* Court of Appeals and the Supreme Court of Virginia, the record is silent on when and where Officer Cox was located when these crucial events

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[1] The trial court resolved this conflict when it stated in its "Factual Findings" that "[b]efore [Officer Cox] reached the point where the front walkway to the front door intersected with the driveway, he saw, by a pine tree seven to eight yards away, two individuals holding clear beer bottles. The individuals appeared to be under 18 years of age." (App. at 132a.) The trial court did not, however, make a finding of Cox's location when the individuals he was watching ran in response to his presence, which the trial court found to constitute exigent circumstances.

occurred. *See* App. at 23a ("Although there is no direct testimony regarding the period of time that elapsed between Officer Cox's sighting of the juveniles and the time that they, in turn, observed him and began to run . . . ."). The *en banc* Court of Appeals of Virginia likewise acknowledged that "the record is silent on the issue of Officer Cox's exact location when the juveniles dropped their beer bottles and ran into the woods" (App. at 50a, n.12).

Having confirmed his suspicions and accomplished his articulated and objective purpose, *i.e.*, to establish probable cause and cause his surprised suspects to "scatter" like "cockroaches," Officer Cox then brought his cruiser to a stop as close to the Robinsons' backyard as possible. (App. at 133a; JA at 120.) He subsequently exited his cruiser, walked into the Robinsons' backyard, up onto the back deck, and went to the back door. (App. at 133a; JA at 141-42.)

Proceedings Below

This case began on nineteen warrants brought by summons against Mr. and Mrs. Robinson alleging that they contributed to the delinquency of nineteen minors in connection with a party at their home on August 16, 2002.

Three of the original nineteen warrants were withdrawn before proceedings commenced in the Juvenile and Domestic Relations District Court of Albemarle County. There, the Robinsons claimed in support of their motions to suppress that Officer Cox violated their Fourth Amendment rights both by exceeding the scope of any "implied consent" or "knock and talk" exception and by manufacturing the exigent circumstances relied upon to justify his presence in the Garage Area and his subsequent entry into the Robinsons' backyard. The Juvenile and Domestic Relations District Court denied the Robinsons' motions and sentenced the Robinsons to one year in jail on each of the sixteen remaining charges, with six months suspended for each charge. In all, the Robinsons each received a total active jail sentence of eight years, and an $80,000 appeal bond.

On the Robinsons' motions, the Circuit Court of Albemarle County subsequently reduced their appeal bond to $5,000 each,

and the Robinsons appealed each of the sixteen convictions to that Court. In the *de novo* proceedings, the Robinsons again moved to suppress the search and seizure of evidence at their home, again contending that Officer Cox exceeded the scope of any "implied consent" or "knock and talk" exception to the Fourth Amendment, and Mr. Robinson argued additionally that Officer Cox manufactured the exigent circumstances relied upon to justify his presence in the Garage Area and his subsequent entry into the Robinsons' backyard.

The Court heard the Robinsons' Motions to Suppress on July 28, 2003, and considered the Robinsons' and Commonwealth's supporting briefs. The court denied the Robinsons' Motions to Suppress (App. at 140a), ruling by opinion letter that, *inter alia*, Officer Cox lawfully entered the Robinsons' property by the driveway; that Officer Cox was in a lawful place when he observed alleged illegal activity in the Robinsons' backyard, which the trial court found was within the curtilage of their home and subject to Fourth Amendment protection; and that the plain view doctrine justified Officer Cox's entry into the Robinsons' constitutionally protected backyard to seize evidence there. (App at 134a-140a.) In making these rulings, the trial court expressly relied upon its conclusion that the driveway, including the Garage Area, was not within the curtilage of the Robinsons' home, and therefore not entitled to Fourth Amendment protection. (App at 136a.)

The Robinsons were subsequently tried on September 3, 2003. The Commonwealth *nolle prossed* seven of the sixteen counts against each defendant, and the Robinsons entered not guilty pleas on the remaining nine counts. The trial court convicted the Robinsons of the nine counts and sentenced each of them to six months in jail with three months suspended on each count, for an active jail sentence of twenty-seven months. The trial court then denied the Robinsons' Joint Motion for Reconsideration without further explanation.

The Robinsons then appealed to the Court of Appeals of Virginia, which appeal was initially rejected in separate

per curium opinions (App. at 122a and 129a) on the grounds that the Robinsons did not have a reasonable expectation of privacy in their driveway, including the Garage Area, and Officer Cox had probable cause and exigent circumstances to enter the Robinsons' backyard. (App. at 117a-122a and 124a-129a.) The Robinsons then sought review of the matter by a three judge writ panel of the Court of Appeals of Virginia, which granted the appeals.

Before the three judge merit panel of the Court of Appeals of Virginia, the Robinsons again argued that Officer Cox exceeded the scope of any "implied consent" or "knock and talk" exception to the Fourth Amendment when he entered the Garage Area of the Robinsons' home while actively engaged in a search. Mr. Robinson also argued that Officer Cox, by entering the Garage Area for the articulated and objective purpose of making his surprised suspects "scatter" like "cockroaches," unlawfully created the exigent circumstances relied upon to justify his presence in the Garage Area and his subsequent entry into the backyard.

The three judge merit panel agreed with the Robinsons that Officer Cox was located within the Robinsons' curtilage when he made his observations (App. at 77a), but a majority ruled that Officer Cox was nevertheless entitled to enter the Garage Area and to search and seize evidence in the Robinsons' backyard based on those observations. (App 80a.) The three judge merit panel affirmed the trial court, basing its ruling on the conclusion that the plain view *doctrine*, as opposed to the plain view *exception*, authorized not only Officer Cox's observations, but also his entry into the Garage Area and the Robinsons' backyard. (App 98a-99a.) (emphasis in original).

But because the three judge merit panel did not articulate any proper legal basis upon which Officer Cox could enter, as opposed to simply observe activities occurring within, the Garage Area or the backyard, *e.g.*, probable cause and exigent circumstances, the Robinsons petitioned for review by the *en banc* Court of Appeals. The Robinsons again argued that their

Fourth Amendment rights were violated by Officer Cox's warrantless entry into the Garage Area, which was within the curtilage of the Robinsons' home and beyond a direct route to the most obvious and prominent entryway of the house, and therefore protected by the Robinsons' reasonable expectation of privacy.[2] Mr. Robinson also reiterated his argument that Officer Cox manufactured the exigent circumstances relied upon to justify his presence in the Garage Area and his subsequent entry into the Robinsons' backyard.

A majority of the *en banc* Court of Appeals disagreed, concluding that Officer Cox's entry into the Garage Area, though within the Robinsons' curtilage and beyond a direct route to the most obvious and prominent entryway to the house, was an entry into an area that the Robinsons "could reasonably expect a visitor" to enter "to park [a] vehicle in that area when attempting to contact the residents of the home." (App at 43a.) Accordingly, the *en banc* Court of Appeals held that the Garage Area was not protected by the Robinsons' reasonable expectation of privacy and that it therefore did not matter whether or not Officer Cox entered the Garage Area before he acquired probable cause and exigent circumstances. (App. at 43a.) The Court of Appeals also rejected Mr. Robinson's argument that Officer Cox created the exigent circumstances. (App at 55a.)

The Supreme Court of Virginia granted the Robinsons' petitions for appeal. The Robinsons' case before the Supreme Court of Virginia focused on the same arguments that they had utilized all along—that Officer Cox exceeded the scope of any "implied consent" or "knock and talk" exception to the Fourth Amendment when he entered the Garage Area pursuant to his search of suspected illegal activity in the backyard, and Mr. Robinson argued further that Officer Cox's purposeful efforts to make his surprised suspects "scatter" like

[2] At this stage of the proceedings, the Commonwealth conceded that the Garage Area was within the curtilage of the. Robinsons' home, but nonetheless argued that the Robinsons had no reasonable expectation of privacy in that area.

"cockroaches" constituted the unlawful creation of exigent circumstances.

The Supreme Court of Virginia affirmed the Robinsons' convictions, concluding: first, that Officer Cox's subjective intent was irrelevant to its determination of whether Officer Cox had exceeded the scope of the Robinsons' implied consent (App at 14a.); second, that Officer Cox obtained probable cause *and* exigent circumstances *before* he entered the Garage Area (App at 17a.); and, third, that Officer Cox did not unlawfully create the exigent circumstances. (App at 23a.)

The Robinsons now timely file this Petition.

REASONS FOR GRANTING THE PETITION

This case now presents two Fourth Amendment issues of first impression for this Court, as well as a third procedural due process issue of first impression as it relates to the standard of review. The first issue of first impression concerns the scope of the "implied consent" or "knock and talk" exception to the Fourth Amendment. *See Robinson*, 639 S.E.2d 217, 221-22 (Va. 2007) ("The Supreme Court has not addressed what expectation of privacy a resident of a dwelling has in those areas of the curtilage, such as driveways and sidewalks, that are generally used by the public to contact a resident."). Though long-standing principles from this Court's jurisprudence tangentially address this emerging doctrine, the collective application of such principles, as in this case, causes a collision of, among other things, traditional concepts of curtilage, reasonable expectation of privacy, consent, and the bedrock features of the warrant requirement.

Granting this Petition is especially warranted given that Officer Cox entered areas of the Robinsons' curtilage that were beyond a direct approach to a well-lit and accessible front door of their residence, *i.e.*, the Garage Area, while purposefully engaged in a search for confirmation of suspected illegal activity allegedly occurring in the Robinsons' backyard. That this area of the law is rife with confusion is best illustrated by the fact that five different judicial bodies decided this case on the

merits—the Albemarle County Juvenile and Domestic Relations Court, the Albemarle County Circuit Court, the three judge merit panel of the Court of Appeals of Virginia, the *en banc* panel of the Court of Appeals of Virginia, and the Supreme Court of Virginia—and each judicial body decided the case on shifting and significantly different grounds.

The next issue of first impression was created by the Supreme Court of Virginia's latest resolution of these issues. After the trial court memorialized its factual findings and legal conclusions in a written opinion, the Supreme Court of Virginia corrected the trial court's improper placement of the Robinsons' "privacy line" at the end of the Garage Area and the start of the backyard. Concluding that the "privacy line" actually belonged at the beginning—rather than the end—of the Garage Area, the Supreme Court of Virginia nevertheless relied upon the trial court's factual findings to *infer* that Officer Cox's observations and the existence of probable cause *and* exigent circumstances occurred *before* Officer Cox unlawfully crossed this newly drawn "privacy line" and entered the Garage Area. Doing so violated the Robinsons' rights to due process of law under the Fourteenth Amendment.

This case also raises a third issue of first impression—the circumstances under which courts should find that a police officer unlawfully created the exigent circumstances relied upon to justify his warrantless entry into a constitutionally protected area. Here, where Officer Cox drove his cruiser onto private property and traveled beyond a direct approach to the well-lit and accessible front door for the articulated and objective purpose of surprising his suspects and making them "scatter" like "cockroaches," the Robinsons contend that Officer Cox unlawfully created the exigent circumstances he needed to bypass the warrant requirement for his subsequent search and seizure.

The time is ripe for this Court to clarify the scope, reaches, and parameters of these Fourth Amendment doctrines, particularly as they are applied collectively, as they were in this

case, to overcome the Robinsons' privacy expectations in areas that the Commonwealth and Courts now admit were within the curtilage of their home. Moreover, this Court must clarify whether an appellate court, after correcting a state trial court's error of law, nevertheless has authority under the applicable standard of review to draw inferences from factual findings that were themselves predicated on the trial court's legal error.

In all, the basic understanding of the curtilage as an area "to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" an area that "has been considered part of the home itself for Fourth Amendment purposes," *Oliver v. United States*, 466 U.S. 170, 180 (1984)—is at stake.

I. HOMEOWNERS, INCLUDING THE ROBINSONS, DO NOT IMPLIEDLY CONSENT TO AN OFFICER'S WARRANTLESS ENTRY UPON THAT PORTION OF THEIR CURTILAGE THAT IS BEYOND A DIRECT APPROACH TO THE MOST OBVIOUS AND PROMINENT ENTRYWAY WHILE PURPOSEFULLY ENGAGED IN A SEARCH FOR CONFIRMATION OF SUSPECTED ILLEGAL ACTIVITY.

In keeping with the decisions of federal circuit courts of appeal and several state courts of last resort,[3] the Robinsons agree that an officer's warrantless "knock and talk" entry onto private property may be lawful under the Fourth Amendment.

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[3] *See United States v. Titemore*, 437 F.3d 251, 260 (2d Cir. 2006); *United States v. Taylor*, 458 F.3d 1201 (11th Cir. 2006); *United States v. Chambers*, 395 F.3d 563, 568 n.2 (6th Cir. 2005); *United States v. Khabeer*, 410 F.3d 477, 481-82 (8th Cir. 2005); *Estate of Smith v. Marasco*, 318 F.3d 497, 520 (3d Cir. 2003); *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001); *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000); *United States v. De Jesus Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 1991); *United States v. Daoust*, 916 F.2d 757 (1st Cir. 1990); *Griffin v. State*, 67 S.W.3d 582 (Ark. 2002); *State v. Brisban*, 809 So. 2d 923, 928 (La. 2002); *Blincoe v. People*, 494 P.3d 1285 (Colo. 1972).

But to maintain harmony with the sanctity accorded the curtilage of the home,[4] the Robinsons argue that the homeowner's "implied consent" to such an entry must be limited in two fundamental ways.

First, the officer's entry must be along a path to "the residence's most direct, obvious, and prominent entryway, which in most cases is the front door." *Trimble v. State*, 816 N.E.2d 83, 88 (Ind. Ct. App. 2004). This entry, Professor LaFave has explained, confines officers to the "normal means of access to and egress from the house." 1 W. LaFave, *Search and Seizure* § 2.3(c) at 393-94 (2d ed. 1987). Exceeding the permitted boundaries of normal means of access constitutes a Fourth Amendment violation.

Second, the officer's entry must be for "legitimate police purposes unconnected with a search of the premises." *See, e.g., United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006); *Rogers v. Pendleton*, 249 F.3d 279, 288 (4th Cir. 2001).[5]

These limitations are necessary to remain faithful to the privacy expectations underlying and supporting the Fourth Amendment.

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[4] The Commonwealth has conceded that Officer Cox's observations occurred in the curtilage of the Robinsons' home. *See Robinson v. Commonwealth*, 639 S.E.2d 217, 221 n.1 (2007) ("Upon rehearing *en banc*, the Commonwealth conceded that the driveway was within the curtilage of the Robinsons' home and this question was, therefore, not before the entire Court of Appeals.").

[5] This principle is rooted in Supreme Court jurisprudence. *See Horton v. California*, 496 U.S. 128, 135-36 (1990) ("The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or *some other legitimate reason for being present unconnected with a search directed against the accused*—and permits the warrantless seizure.") (emphasis added); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

A. Officer Cox did not have the Robinsons' "Implied Consent" to Travel Beyond a Direct Approach to the Most Obvious and Prominent Entryway to the Robinsons' Home.

Police officers, like other citizens, are permitted "to walk up the steps and knock on the *front door* of any man's 'castle' with the honest intent of asking questions of the occupant thereof." *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964) (emphasis added).

Though some courts have allowed officers to enter a side or backyard to attempt to speak with the homeowner, every one of those cases required the officers in question to initially approach the front door and go to the side or backyard after—and only after—not receiving a response to knocking at an accessible front door or determining that an approach to an accessible front door would be futile.[6] Indeed, it is utterly

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[6] Even the trial court in *Brigham City v. Stuart*, reversed by this Court on other grounds, made the factual finding that "[a]fter arrival at the residence, the officers, from their observations from the front of the residence, determined that it was obvious that knocking on the front door would have done no good. It was appropriate that they proceed down the driveway alongside the house to further investigate." *Brigham City v. Stuart*, 57 P.3d 1111, 1113 (Utah App. 2002); *see also United States v. Hammett*, 236 F.3d 1054 (9th Cir. 2001) (police can move away from front door to attempt to contact occupants only if no answer at front door); *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990) (noting that, if the front door is inaccessible, "there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person"); *United States v. Anderson*, 552 F.2d 1296, 1300 (8th Cir. 1977) (not unreasonable to go to back door after knock at front door unanswered); *United States v. Bradshaw*, 490 F.2d 1097, 1100 (4th Cir. 1974) (declaring that officer was within scope of invitation "by walking around to the back door when he was unable to get an answer at the front door"); *Trimble v. State*, 816 N.E.2d 83, 90 (Ind. Ct. App. 2004) (initial approach to back door not an "obvious and direct route" to house, hence unlawful); *Divello v. State*, 782 N.E.2d 433, 438 (Ind. Ct. App. 2003) (Cont'd)

unprecedented and completely at odds with the privacy interests animating the Fourth Amendment to allow police officers to do otherwise. This is not to say that an officer could not eventually enter a side or backyard on the basis of "implied consent." To enter such an area, however, the officer's attempt to talk to the inhabitants at "the most direct, obvious, and prominent entryway" must have gone unanswered or have been reasonably determined to be futile.[7]

The Supreme Court of Virginia properly followed this established line of cases when it undertook to analyze whether Officer Cox had both probable cause *and* exigent circumstances *before* he entered the Garage Area. *See, e.g.*, App. at 18a-19a (concluding that Cox had probable cause before "he reached the path to the front door," but "*In order to proceed further*," Cox also needed "exigent circumstances") (emphasis added); App. at 17a ("We also hold that Officer Cox acted with probable

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(Cont'd)
("Common experience teaches that under normal circumstances, uninvited visitors coming to a residence to speak with an owner or resident are expected to come to the residence's most direct, obvious and prominent entryway, which in most cases is the front door."); *State v. Somfleth*, 8 P.3d 221, 227 (Ore. Ct. App. 2000) (initial entry directly into backyard "was unlawful" because beyond invitation); *State v. Harris*, 919 S.W.2d 619, 624-25 (Tenn. Crim. App. 1995) (right to approach front door does not justify search of property); *State v. Clouthier*, 544 A.2d 1277, 1279 (Me. 1988) (no answer at main door of house); *State v. Seagull*, 632 P.2d 44, 48-49 (Wash. 1981) (not unreasonable to seek out back door *after* knocking at front door); *Lorenzana v. Superior Court*, 511 P.2d 33, 44 (Cal. 1973) (initial approach to side door beyond scope of invitation); *see also Alvarez v. Montgomery County*, 147 F.3d 354, 359 (4th Cir. 1998) (upholding search where officers went straight to back yard only because sign stated "Party In Back" and arrow pointed to backyard).

[7] In this way, this futility requirement for a knock and talk is similar to the futility requirement of the "knock and announce" rule, whereby officers can skip the knock and announce if they have "reasonable suspicion of . . . futility." *United States v. Banks*, 540 U.S. 31, 37 n.3 (2003).

cause and under exigent circumstances when he proceeded past the path and into the garage area and backyard without a warrant."); App. at 22a ("[W]e conclude that exigent circumstances justified Officer Cox's entry into the garage area and the backyard").

As the Supreme Court of Virginia agreed, the point where the driveway intersected with the front walkway formed the line where the Robinsons no longer impliedly consented for uninvited and unannounced visitors to go. That being so, it was at this point, *i.e.*, the start of the Garage Area, that the Robinsons' "implied consent" ended, their reasonable expectation of privacy began, and Officer Cox was not entitled to cross without a warrant, express consent, or probable cause *and* exigent circumstances.

Officer Cox did not have a warrant, nor did he have the Robinsons' express consent. And though the Supreme Court of Virginia held that Officer Cox had probable cause *and* exigent circumstances *before* he entered the Garage Area, it was only able to reach this conclusion by violating the applicable standard of review, as discussed *infra* at *II.*

B. Officer Cox Did Not Have a "Legitimate Purpose Unconnected to a Search of the Premises" for Entering the Garage Area.

The Supreme Court of Virginia dismissed the second prong of the Robinsons' "implied consent" analysis by conflating two distinct legal concepts—subjective intent and "legitimate purpose unconnected to a search of the premises." Indeed, the Supreme Court of Virginia spent the bulk of the substantive portion of its opinion analyzing whether this Court, in light of *Brigham City v. Stuart*, 547 U.S. __, 126 S.Ct. 1943 (2006), would consider an officer's subjective intent under an "implied consent" exception to the Fourth Amendment. Predicting that this Court would hold that "Officer Cox's subjective intent was irrelevant to a determination of whether he exceeded the scope of the implied consent in conducting the challenged search and seizure" (App at 14a), the Court rejected the Robinsons' argument.

But the Supreme Court of Virginia's analysis missed what the Robinsons believe is an important distinction between an officer's subjective intent (which this Court may indeed find irrelevant)[8] and a determination as to whether or not the officer has a "legitimate purpose unconnected with a search of the premises" to be in a particular place (which numerous courts have stated is an element of the "implied consent" exception to the Fourth Amendment).

Given the delicate interests in the balance when an officer enters private property without a warrant, courts across the nation have repeatedly held, in fact, that an officer's entry upon the curtilage of a home must be premised upon "legitimate police business unconnected to a search of the premises." *United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006).[9] And while it

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[8] *But see* the dissenting opinion to the three judge merit panel of the Court of Appeals of Virginia (App. at 101a-116a) and one of the dissenting opinions to the *en banc* Court of Appeals of Virginia (App. at 65a-70a.).

[9] *See,e.g., Estate of Smith v. Marasco*, 318 F.3d 497, 520 (3d Cir. 2003)

> Where officers are pursuing a lawful objective, unconnected to any search for the fruits and instrumentalities of criminal activity, their entry into the curtilage after not receiving an answer at the front door might be reasonable as entry into the curtilage may provide the only practicable way of attempting to contact the resident. . . .

See generally Rogers, 249 F.3d at 289; *Hammett*, 236 F.3d 1054, 1059 (9th Cir. 2001) ("Law enforcement officers may encroach upon the curtilage of a home for the purpose of asking questions of the occupants."); *Alvarez*, 147 F.3d at 358; *Daoust*, 916 F.2d at 758 ("A policeman may lawfully go to a person's home to interview him."); *cf. Lo-Ji Sales v. New York*, 442 U.S. 319, 329 (1979) (recognizing that store owners had a reasonable expectation of privacy in their premises and, even though visitors are invited on to their premises, "there is no basis for the notion that, because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees").

may be true for the purposes of this appeal that Officer Cox's "purpose in entering the Robinsons' property was to investigate a report of juveniles consuming alcoholic beverages" (App. at 15a) and that "investigation may include ... contacting the occupants of a residence and asking them questions" (App. at 15a), the objective evidence in this case does not support the conclusion that this is what Officer Cox was doing.

As discussed *supra*, if Officer Cox's "legitimate police business" was to contact the inhabitants of the Robinsons' residence, then Officer Cox was entitled to approach "the residence's most direct, obvious, prominent entryway," which in this case, like most cases, was the front door of the Robinsons' home. But Officer Cox exceeded the physical scope of this implied consent and entered the Garage Area. And his reason for doing so was not to contact the Robinsons—it was to make confirmatory observations and cause his surprised suspects to "scatter" like "cockroaches." Accordingly, Officer Cox impermissibly and unlawfully exceeded the scope of his "legitimate reason," thereby violating the Fourth Amendment.

Support for this proposition is found in *United States v. Bradshaw*, 490 F.2d 1097, 1101 (4th Cir. 1974), where the Fourth Circuit Court of Appeals concluded that a "legitimate reason" can become illegitimate, thus rendering any further intrusion presumptively unlawful, when an officer exceeds the "original purpose of his intrusion, which had justified his presence on defendant's property up to that point." This happened in *Bradshaw* when the agent made "confirmatory observations" through a crack in the rear door of a truck on his way to the rear of the defendant's house after his unsuccessful attempt to reach the residents at the front door. *Id.* The Court noted that "[t]he truck was parked on defendant's property very near to his residence. Under such circumstances, the defendant had a reasonable expectation that the contents of his truck would remain unknown to the general public." *Id.*

Though the *Bradshaw* principle limits the permissible conduct of police officers while they are in the curtilage of a

home, it does not unreasonably hinder legitimate and effective law enforcement activities, as the Fourth Circuit's decision in *Alvarez v. Montgomery County*, 147 F.3d 354, 358 (4th Cir. 1998) demonstrated. In *Alvarez*, the Fourth Circuit concluded that police could enter private property without a warrant provided they stay within the bounds of their "legitimate reason" for entering the property. The entry in *Alvarez* was justified because the purpose of the officers' entry was "simply to notify the homeowner or the party's host about the complaint of an underage drinking party and to ask that no one drive while intoxicated." *Id.* at 358. "Thus, like the agents in *Bradshaw*, the officers in this case had a 'legitimate reason' for entering the Alvarezs' property 'unconnected with a search of such premises . . . .'" *Id.* (quoting *Bradshaw*, 490 F.2d at 1100). Not only does *Alvarez* support the conclusion that entry for a reason unconnected to a search of a homeowner's property is a legitimate one, it also makes clear that officers remain faithful to the Fourth Amendment by respecting the scope of the "legitimate reason" that authorized their entry.

In line with these holdings, police officers in *Rogers v. Pendleton* arrived at a private residence in response to several noise complaints. *Rogers*, 249 F.3d at 284. The officers made contact with the property owner in the front yard, at which time the owner requested that the officers leave. *Id.* "At that point, they no longer had a legitimate reason unconnected with a search of the premises," the *Rogers* court concluded, "and the reasoning of *Alvarez* thus indicates that they would have exceeded the legitimate reasons for their entry had they proceeded to conduct a general search of the curtilage." *Id.* at 288. So, in other words, when the homeowner revoked his implied consent for the officers' entry, he also revoked the officers' legitimate reason for being on the property.[10]

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[10] The *Rogers* holding was especially significant considering that this argument arose in the context of a 42 U.S.C. § 1983 claim, which required Mr. Rogers to demonstrate that his Fourth Amendment protection "is clearly established."

In balancing a police officer's right to enter curtilage with the homeowner's privacy rights in his curtilage, the Fourth Circuit has taken the lead in announcing that officers have a "right to 'knock and talk,' that is to knock on a resident's door or otherwise approach the residence seeking to speak to the inhabitants, not the right to make a general investigation in the curtilage based on reasonable suspicion." *Id.* at 289 (citing *U.S. v. Tobin*, 923 F.2d 1506 (11th Cir. 1991)); *see also Davis v. United States*, 327 F.2d 301 (9th Cir. 1964). In light of this admonition, police can enter upon property to conduct a "knock and talk" provided those officers strictly adhere to the fictional consent that authorizes their entry. No Fourth Amendment violation occurs so long as those officers remain on the direct path to the front door and do not engage in a search.

Here, Officer Cox's articulated and objective purpose for entering the Robinsons' property and then driving his cruiser into the Garage Area was to investigate reports of alleged underage drinking and to establish probable cause (App. at 132a; JA at 144); to identify his suspects, to find out their age, to see if the bottles they were holding contained alcohol (JA at 146); and to observe his suspects "scatter" like "cockroaches" (JA at 138-39), clearly not the "legitimate reason" "unconnected with a search of the premises" required by *Bradshaw*, *Alvarez* and *Rogers*. And the Supreme Court of Virginia's limited attempt to distinguish these cases is not compelling. (App. at 14a-15a.)

No evidence suggests that Officer Cox drove past the front walkway and entered the Garage Area because he was trying to access the front walkway or otherwise make contact with the Robinsons; he testified that he could have gone to the front door before that point. The only evidence on this point is that Officer Cox was taking certain affirmative action in an ongoing and progressive attempt to establish probable cause, an "illegitimate reason" that was directly connected to a search of the premises. And because Officer Cox's articulated and objective purpose for entering the Garage Area was to search for confirmation of suspected criminal activity that he believed

was occurring in the Robinsons' backyard, any "legitimate reason" he may have previously enjoyed was revoked.

II. THE SUPREME COURT OF VIRGINIA VIOLATED THE STANDARD OF REVIEW AND, ACCORDINGLY, THE ROBINSONS' PROCEDURAL DUE PROCESS RIGHTS, BY DRAWING AN INFERENCE FROM THE TRIAL COURT'S FACTUAL FINDINGS AFTER CORRECTING THE TRIAL COURT'S PREDICATE LEGAL ERROR.

As stated *supra* at *I.A.*, under the Supreme Court of Virginia's holding, which adopted the Robinsons' physical scope argument, Officer Cox could not lawfully enter the Garage Area unless Officer Cox obtained both probable cause *and* exigent circumstances *before* he entered the Garage Area. *See, e.g.*, App. at 18a-19a (concluding that Cox had probable cause before "he reached the path to the front door," but "*in order to proceed further*," Cox also needed "exigent circumstances") (emphasis added); App. at 17a ("We also hold that Officer Cox acted with probable cause and under exigent circumstances when he proceeded past the path and into the garage area and backyard without a warrant."); App. at 22a ("[W]e conclude that exigent circumstances justified Officer Cox's entry into the garage area and the backyard").[11]

Reaching this legal conclusion in its *de novo* legal analysis required the Supreme Court of Virginia to correct the trial court's

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[11] Though the Robinsons admit that "state courts are not required to apply [Federal Rule of Civil Procedure] 52(a)," *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712 (1986), the Robinsons nevertheless contend that the standard of review principles embodied in Rule 52(a)—*i.e.*, a trial judge's written findings premised upon an incorrect legal standard are not binding on appellate courts—contain minimal due process safeguards that transcend the Rule 52(a) context and apply equally to state court proceedings where a trial judge decides both the facts and the law in a mixed question setting. This is particularly true where, as here, the constitutionality of a search depends entirely on an inference that was undoubtedly based on the incorrect legal placement of the privacy line, which the appellate court corrected.

legal error. The trial court had determined, after all, that no portion of the driveway (most notably, the Garage Area) was constitutionally protected. *See* App. at 136a ("[T]he Robinsons' driveway is not part of the curtilage of the home and Corporal Cox's presence there does not implicate the Fourth Amendment.").

After correcting the trial court's legal error regarding the proper placement of the privacy line, the Supreme Court of Virginia acknowledged that there was no evidence in the record stating where Officer Cox was when he obtained exigent circumstances justifying his entry into the Garage Area. *See* App. at 23a ("Although there is no direct testimony regarding the period of time that elapsed between Officer Cox's sighting of the juveniles and the time that they, in turn, observed him and began to run . . . ."). The *en banc* Court of Appeals of Virginia likewise acknowledged that "the record is silent on the issue of Officer Cox's exact location when the juveniles dropped their beer bottles and ran into the woods" (App. at 50a, n.12).

These things being true, the Supreme Court of Virginia had to rely on an *inference* that Officer Cox had not yet entered the Garage Area at the moment he obtained exigent circumstances. *See, e.g.*, App. at 23a ("Officer Cox's testimony *suggests* that any intervening time period was negligible.") (emphasis added). This conclusion tracked the *en banc* Court of Appeals' decision, which also inferred that the "development of probable cause and the creation of exigencies were virtually contemporaneous." App. at 56a.

The problem with this approach, however, is that the Supreme Court of Virginia's act of correcting the trial court's placement of the privacy line should have invalidated any inferences stemming from the trial court's factual findings that were premised on the incorrectly placed privacy line. Normally in situations such as this, the standard of review allows the reviewing court to infer that the trial court's unspoken factual findings comport with the governing legal standard. On appeal, the standard of review "gives full play to the responsibility of

the trier of fact" to, among other things, "draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

And when functioning in this case, the standard of review would have normally permitted an inference—in the absence of an express finding of fact to the contrary—that the juveniles looked at Officer Cox, looked away, yelled "cops," dropped their bottles, and ran away, all before Officer Cox entered the Garage Area. Put another way, the standard of review would have normally permitted the Supreme Court of Virginia to infer that Officer Cox obtained both probable cause *and* exigent circumstances *before* he entered the Garage Area, despite the record's silence on this point.

But after correcting the trial court's legal error regarding the proper placement of the privacy line, the Supreme Court of Virginia was not entitled to such an inference. This is because the trial court's factual findings were predicated upon an erroneous legal determination that no part of Mr. Robinson's driveway—much less the Garage Area—was curtilage and protected by a reasonable privacy expectation, which meant that the trial court drew the line between public and private area well past the *true* privacy line. This error of law gave the trial court many additional yards in which to fit its factual findings and, under that erroneously broad legal view, Officer Cox would not have committed a Fourth Amendment violation so long as he made his confirmatory observations before he reached the Robinson's backyard. Allowing Officer Cox to proceed that far into the Robinsons' property—in light of the extensive safeguards in place to shield those areas from any sort of public inspection—would constitute nothing short of a blatant infringement of the Robinson's Fourth Amendment privacy expectations.

Because a trial court's mixed law/fact conclusion based on an erroneous legal standard may lead to absurd results, such a legal error strips the factual finding of its normal deference on appeal "as a matter of law." *See United States v. Singer Mfg.*

Co., 374 U.S. 174, 195 n.9 (1963) ("Insofar as that conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law."). "*Of course*, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Labs v. Ives Labs.*, 456 U.S. 844, 855 n.15 (1983)) (emphasis added); *see also Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (explaining that appellate courts are not inhibited from correcting "errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law") (citation omitted); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.16 (1984) ("Finding so-called ultimate 'facts' more clearly implies the application of standards of law. . . . Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court.").[12]

In sum, correcting the trial court's error of law (*i.e.*, the proper placement of the privacy line) to match up with the true privacy line (*i.e.*, where the front walkway intersects the driveway and the Garage Area begins), should have precluded the Supreme Court of Virginia from inferring that Officer Cox's

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[12] *See also County Sch. Bd. v. Z.P.*, 399 F.3d 298, 309 (4th Cir. 2005) ("The clearly erroneous rule does not protect findings made on the basis of the application of incorrect legal standards."); *Keir v. United States*, 853 F.2d 398, 417 (6th Cir. 1988); *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377, 1381 (11th Cir. 1983); *Le Blanc v. Two-R Drilling Co.*, 527 F.2d 1316, 1320 (5th Cir. 1976); *Lincoln v. Bd. of Regents*, 697 F.2d 928, 939 n.13 (11th Cir. 1983) ("The 'clearly erroneous' standard under which we review the district court's factual findings . . . does not insulate factual findings influenced by legal error."); *Smith v. Hightower*, 693 F.2d 359, 370 n. 29 (5th Cir. 1982) ("It is a well-established rule of this Circuit that the clearly erroneous standard does not apply 'when an improper legal standard, or a proper one improperly applied, is utilized by a District Court in arriving at its findings.'") (citation omitted).

observations occurred before he entered the Garage Area. That so, there is no evidence in the record to support the Supreme Court of Virginia's conclusion that Officer Cox had both probable cause *and* exigent circumstances *before* he entered the Garage Area. Indeed, without any deference to the trial court, a reviewing court would be compelled based upon a review of the record to find that exigent circumstances did not arise until *after* Officer Cox crossed the privacy line and entered the Garage Area. As such, Officer Cox violated the Robinsons' Fourth Amendment rights.

III. OFFICER COX, BY CONTINUING PAST THE MOST DIRECT ROUTE TO THE ROBINSONS' WELL-LIT AND ACCESSIBLE FRONT DOOR FOR THE ARTICULATED AND OBJECTIVE PURPOSE OF MAKING HIS SURPRISED SUSPECTS "SCATTER" LIKE "COCKROACHES," CREATED THE EXIGENT CIRCUMSTANCES RELIED UPON TO JUSTIFY HIS PRESENCE IN THE GARAGE AREA AND HIS SUBSEQUENT ENTRY INTO THE ROBINSONS' BACKYARD.

Assuming *arguendo* that Officer Cox obtained both probable cause and exigent circumstances to justify his entry into the Robinsons' Garage Area, it was Officer Cox's conduct that created the exigent circumstances in the first place. And the law supporting this issue—when and how particular conduct will rise to the level of unlawful manufacturing of exigent circumstances for purposes of bypassing the warrant requirement—has never been squarely addressed by this Court.

Well-established law holds that an officer must possess both probable cause and exigent circumstances in order to make a warrantless entry into a constitutionally protected area. *See Payton v. New York*, 445 U.S. 573, 587-88 (1980) ("[A]bsent exigent circumstances, a warrantless entry to search . . . is unconstitutional even when . . . there is probable cause to believe that incriminating evidence will be found within"). And, "the critical time for determining whether exigent circumstances exist

'is the moment of the warrantless entry by the officers' onto the premises of the defendant." *United States v. Morgan*, 743 F.2d 1158, 1162 (6th Cir. 1984) (quoting *United States v. Killebrew*, 560 F.2d 729, 733 (6th Cir. 1977)); see also *United States v. Coles*, 437 F.3d 361, 367 (3rd Cir. 2006) (explaining that exigent circumstances must exist '*before* the police decide to knock and announce themselves at the door.") (citing *United States v. Richards*, 994 F.2d 244 (5th Cir. 1993)) (emphasis in original).

Lower courts are settled in their declaration that law enforcement officers must not create the exigent circumstances they rely upon to justify their warrantless entry into a constitutionally protected area. *See United States v. Coles*, 437 F.3d 361 (3d Cir. 2006); *United States v. Howard*, 106 F.3d 70, 78 (5th Cir. 1997) ("Whereas exigent circumstances are the exception to the warrant requirement, a manufactured exigency is the exception to the exception"); *United States v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991); *United States v. Socey*, 846 F.2d 1439, 1448 (D.C. Cir. 1988). Less settled, however, are the parameters and rules that guide the analysis of whether police conduct in this regard violates the Fourth Amendment.

Precedent from the Fifth Circuit Court of Appeals is particularly instructive on this issue. "To determine whether law enforcement officials have manufactured an exigency, we look to whether (1) there was sufficient time to secure a warrant, and (2) whether the exigency was created by unreasonable law enforcement tactics." *Howard*, 106 F.3d at 78 (citation omitted); *see also Coles*, 437 F.3d at 368 ("[I]n assessing whether police impermissibly create exigent circumstances," courts must pay particular attention to "the reasonableness and propriety of the officers' actions and investigative tactics leading up to the warrantless entry.") *citing U.S. v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004)).[13]

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[13] Likewise, the Eighth Circuit Court of Appeals has held that "inquiry . . . into the reasonableness and propriety of the investigative tactics that generated the exigency . . . seems to be what courts have in

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Under the first prong of this manufacturing test—whether the officers had sufficient time to secure a warrant—perhaps the most crucial factor to consider is whether the government agents controlled the timing of their activity. "[W]hen the Government controls the timing of an investigation, exigent circumstances arising out of law enforcement actions consistent with that timing are deemed manufactured." *Id.* (citations omitted). And the fact that police officers had insufficient time to obtain a warrant is not dispositive. *See Howard*, 106 F.3d at 78 (undertaking to "consider the reasonableness of the law enforcement tactics in this case" even though the Court had already concluded that the officer did not have sufficient time to secure a warrant). Stated simply, police officers cannot exert pressure to create an emergency that they then use to bypass the warrant requirement.

And with regard to this second consideration, *i.e.*, whether the exigency was created by unreasonable law enforcement tactics, two subfactors are relevant: "'first, whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement, and second, even if they did not do so in bad faith, whether their actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement.'" *Coles*, 437 F.3d at 368 (citing *U.S. v. Gould*, 364 F.3d at 590); *see also United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995) (holding that "exigencies can be manufactured guilelessly or ulteriorly," and bad faith on the part of the officers is not required). Indeed, on a number of occasions, courts have "found exigencies were manufactured despite the absence of evidence showing specific intent to subvert the warrant requirement." *Howard*, 106 F.3d at 78.

(Cont'd)

fact been doing" and represents the "better question to ask." *United States v. Howard*, 106 F.3d 70, 79 (5th Cir. 1997) (quoting *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990)).

In this case, the Robinsons maintain that the *entry* at issue was Officer Cox's entry into the Garage Area. And before Officer Cox reached that critical point, the following had occurred: the police had received three telephone calls regarding a possible underage drinking party at the Robinsons' home (App. at 132a; JA at 104, 109-10, 154, 160); in response to these calls, at least five police officers, including Officer Cox, rendezvoused at approximately 10:30 p.m. to develop a plan of action, which was at least 30 minutes before Officer Cox's warrantless entry into the property (JA at 128-129); Officer Cox was instructed to go alone in his cruiser to investigate while all other units held their positions approximately one-half mile away to await further information from Officer Cox (JA at 111); as he approached the Robinsons' home at 11:00 p.m., Officer Cox saw ten to twenty cars parked on the street and then two or three additional cars parked in the Robinson's driveway (App. at 132a; JA at 113); Officer Cox did not see anyone leaving the premises or in the Robinsons' front yard (App. at 132a-133a; JA at 131); in response to these observations, Officer Cox summoned the other officers because he had found the party (App. at 3a; JA at 114); Officer Cox continued his progression up the Robinsons' driveway and, when he was at the "bush," saw two juveniles holding clear beer bottles in the Robinsons' backyard (App. at 132a; JA at 118-19, 149-50); while still proceeding up the Robinsons' driveway, Officer Cox got close enough to his suspects to recognize that they had not yet seen him approaching (JA at 137); but still Officer Cox did not stop his progression as he continued to observe his suspect's movements. (JA at 138.)

Based on these facts, at the moment that Officer Cox bypassed the front walkway to the well-lit and accessible front door and entered the Garage Area, he could not have reasonably concluded that exigent circumstances were present. Indeed, at that critical moment, none of the circumstances that the courts determined to be exigent were present. And, by continuing to drive past this point, Officer Cox firmly controlled the timing of the investigation.

It is critically important that Officer Cox knew the two juveniles that he was watching had not seen him[14] and no evidence suggested that anyone else had seen Officer Cox. Accordingly, there was no immediate threat that evidence would be destroyed or that anyone would flee the scene, both of which are crucial components for this inquiry. *See United States v. Tobin*, 923 F.2d 1506, 1511 (11th Cir. 1991) ("Circumstances are not normally considered exigent where the suspects are unaware of police surveillance."); *see, e.g., United States v. Richard*, 994 F.2d 244, 249 (5th Cir. 1993) (dismissing as "pure speculation" the government's argument that the occupants of a motel room would have suspected problems when their arrested cohort did not return, stating that "[n]o evidence was offered at the suppression hearing to suggest that the room's occupants knew about [the] arrest, that they were aware they were being watched, or that they were destroying evidence.").

But in this case, Officer Cox knew as he bypassed the front walkway to the well-lit and accessible front door and entered the Garage Area that his suspects had not yet seen him and that when they did, they would "scatter" like "cockroaches." Officer Cox was not surprised by what subsequently transpired—indeed, he knowingly provoked it by controlling the timing of his entry and continuing his entry until he made his surprised suspects "scatter" like "cockroaches."

It was precisely this course of provocative conduct, not naturally occurring "intervening circumstances," (App. at 15a) that created the exigent circumstances that led to Officer Cox's warrantless entry into the Robinsons' backyard. Officer Cox's conduct was therefore unreasonable and improper and the Supreme Court of Virginia erred by ruling to the contrary.

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[14] Even if this Court concludes that Officer Cox's intent was irrelevant, the facts that are known to him are very relevant, especially in this context. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

IV. THE ISSUES IN THIS CASE ARE RECURRING ISSUES OF GREAT LEGAL AND PRACTICAL IMPORTANCE.

Although its origins are fairly recent, the "implied consent" or "knock and talk" exception to the Fourth Amendment has experienced explosive popularity. "Before this type of consent search became so fashionable, the police were forced to investigate anonymous or unreliable tips before they could attempt to seize evidence." *Griffin v. State*, 67 S.W.3d 582, 590 (Ark. 2002), Corbin, J., concurring. With the creation of the knock and talk, however, police officers are "free to dispense with actual police work and 'cut to the chase' of seizing evidence." *Id.*

At least one commentator has referred to the "knock and talk" as a technique that has gained popularity due to its ease in circumventing Fourth Amendment protections. *See* Carrie Leonetti, *ARTICLE: Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 Geo. Mason U. Civ. Rts. L.J. 297, 311 (Spring 2005) ("These techniques were designed by police to gain entry for a search without obtaining a warrant and, ultimately, to avoid the encumbrances caused by the protections provided by the Fourth Amendment."). That the "knock and talk" procedure's widespread acceptance is recent is evidenced by the fact that the first reported case using the term "knock and talk" appeared in 1991. *See, e.g., State v. Land*, 806 P.2d 1156 (Or. App. 1991); Leonetti, *ARTICLE: Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 Geo. Mason U. Civ. Rts. L.J. 297, 311 (Spring 2005).

Police officers around the country have embraced the use of the "knock and talk" procedure, and it light of its widespread use, the time has come for this Court to weigh in on the procedure's relationship to Fourth Amendment guarantees and to clearly articulate its parameters. Doing so is all the more compelling here, where police officers used the procedure hand-

in-hand with conduct that created the exigencies ultimately relied upon by the officer and the courts to uphold the warrantless search and seizure that occurred in this case.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF VIRGINIA DATED JANUARY 12, 2007

SUPREME COURT OF VIRGINIA

Record Nos. 060417, 060426.

Jan. 12, 2007.

Elisa K. ROBINSON

v.

COMMONWEALTH of Virginia

George F. Robinson

v.

Commonwealth of Virginia.

Present: All the Justices.

OPINION BY Justice ELIZABETH B. LACY.

In these consolidated appeals, we consider whether a warrantless search and seizure within the curtilage of a private residence violated the Fourth Amendment either because the investigating officer (1) did not act within the scope of the implied consent for uninvited individuals, including law enforcement, to enter the curtilage of the residence in order to contact the occupants, or (2) did not have probable cause and exigent circumstances under the facts presented.

Appendix A

FACTS

Our recitation of the facts is based both on a Joint Stipulation (Stipulation) executed by the attorney for the Commonwealth, Elisa K. Robinson (Elisa) and George F. Robinson (George), and on the testimony of Corporal Scott Cox of the Albemarle County Police Department (Officer Cox). On appellate review, we are bound by the familiar principle that "we must consider the evidence and all reasonable inferences fairly deducible therefrom in the light most favorable to the Commonwealth, the prevailing party below." *Rose v. Commonwealth*, 270 Va. 3, 6, 613 S.E.2d 454, 455 (2005).

According to the Stipulation, on August 16, 2002, Elisa and George hosted a party for Elisa's son Ryan to celebrate his sixteenth birthday. Elisa purchased food and beverages for the party in the amount of $1,013.97, including $350.48 for alcoholic beverages. She also purchased "five [large] trashcans for the purpose of icing down" the beverages.

Prior to the party, George and Elisa spoke with the parents of some of the invited juveniles. Elisa told these parents that she intended to collect the juveniles' car keys and that she would "move [her] sports utility vehicle across the driveway once all the guests had arrived to prevent the juveniles from leaving" the party. Elisa did not tell any of the parents she intended to serve alcoholic beverages. Further, during the party, one juvenile overheard George stating to someone on the telephone "that there was no alcohol at the party."

Appendix A

Approximately thirty juveniles attended the party. The trash cans containing the alcoholic beverages were placed in the backyard behind the fence "so that they would not be visible to any parent who brought their children to the party." Elisa and George neither encouraged the juveniles to consume alcoholic beverages nor discouraged them from doing so. George, however, instructed several of the juveniles not to drink near the pool "because he did not want [any] broken glass in [the] pool."

Officer Cox testified that on the night of the party, the Albemarle County Police Department received three telephone calls reporting the possibility of juveniles consuming alcoholic beverages at a party at the Robinsons' home. In response to these calls, Officer Cox drove to the Robinson home at around 11:00 p.m. in a marked police vehicle.

As Officer Cox approached the property, he observed approximately 10 to 20 vehicles parked along the adjacent public road. He also saw "two or three" vehicles parked on the left side of the driveway. Based on these observations, Officer Cox contacted other Albemarle County police officers waiting in the vicinity and instructed them to "start heading this way" because it "appears that there's a party."

When Officer Cox turned his vehicle into the driveway, he could see the house, the front door and porch, and the front yard, but he could not see the end of the driveway, the garage area, or the backyard. As Cox proceeded up the driveway, he observed several additional vehicles parked near the right side

of the driveway. He was also able to see, in front of the house, a "small circular portion of the driveway" that encircled a stand of trees. Instead of parking in the circular portion of the driveway, Officer Cox drove his vehicle along the main portion of the driveway, which continued past the trees and led to the garage area on the right side of the house. A path leading to the front door intersected the driveway beyond the stand of trees but a few feet before the garage area. A large bush was located adjacent to the driveway immediately in front of this path.

Before Officer Cox reached the point where the path intersected the driveway, he saw two individuals holding clear beer bottles. Both were standing approximately seven to ten yards "into the back yard" and appeared to be younger than 21 years of age. When the individuals saw Officer Cox's vehicle they yelled "cops," dropped their beer bottles, and ran along a fence line toward the woods behind the house.

Officer Cox then pulled his vehicle into the garage area and parked on the concrete pad. From there, Officer Cox saw a patio table covered with beer bottles as well as "[b]eer bottles spread throughout the [back]yard." Officer Cox stepped out of his vehicle, "yelled for [people] to stop [running]," and "got on the radio, and ... told everybody that was arriving on the scene that the kids were running east, past the house, into the woods." He then went into the backyard to locate "the juvenile hosting the party."

Officer Cox testified that he wanted to locate the host to "find out what was going on [and] find out who the people were that were running away." He was

"worried for their safety" and "wanted to find out who they were, so [the police] could contact parents." In the backyard, Officer Cox spoke with one of the juveniles and, "based on that conversation," approached the back of the house. Through the sliding glass door at the back of the house, Officer Cox saw George and Elisa sitting at a kitchen table.

According to the Stipulation, when the other police officers arrived at the Robinsons' home, they found four trash cans in the backyard filled with alcoholic beverages, empty alcoholic beverage bottles in the yard, and half-empty bottles on the table and on the rear deck. Despite the Robinsons' professed intentions to collect the car keys of all the party guests and have them remain overnight, the Robinsons had only collected five or six sets of keys. They also had not blocked the driveway in order to prevent guests from leaving. While the police were conducting their investigation on the premises, Elisa told several of the juveniles to "swallow vinegar in order to fool the Alcosensor." Elisa also instructed one girl to "tell her parents that a boy had spilled alcohol on her" to explain why she "tested positive" on the Alcosensor. Nine of the juveniles at the Robinsons' residence had "measurable levels" of alcohol in their systems when the police arrived.

The Robinsons were arrested and each was charged with 16 counts of contributing to the delinquency of a minor under Code § 18.2-371. Both Elisa and George filed motions to suppress the evidence obtained from Officer Cox's entry onto their property, arguing that Officer Cox's conduct violated the Fourth Amendment because he was not in a place

that he was legally entitled to be when he witnessed the illegal activity.

In a letter opinion, the trial court denied the Robinsons' motions to suppress, finding as matters of fact that Officer Cox "planned to enter the property to investigate the allegations of underage consumption of alcohol," and that he saw the juveniles with beer "[b]efore he reached the point where the front walkway to the front door intersected with the driveway." After finding that the driveway was not part of the curtilage of the Robinsons' home, and therefore did not implicate the Fourth Amendment, the trial court determined that Officer Cox's presence on the driveway was lawful because he had the right to approach a home and knock on the front door to speak to an occupant. The trial court also found that Officer Cox's warrantless entry into the backyard was permissible because he "had the requisite probable cause, which requires that an officer's knowledge of the facts and circumstances are sufficient to justify a reasonable person to think an offense is being committed." The trial court denied the Robinsons' joint motion for reconsideration.

The trial court later granted the Commonwealth's motion to terminate by nolle prosequi seven of the charges against each of the Robinsons. Although the Robinsons stipulated that the evidence was sufficient to sustain convictions on the nine remaining charges against each of them, they pleaded not guilty to the charges, thereby preserving their position that the evidence was illegally obtained and should have been suppressed. The trial court found both the Robinsons guilty and sentenced each of them to consecutive

terms of six months' imprisonment, with three months suspended, on each charge.

The Robinsons appealed their convictions to the Court of Appeals, which consolidated the appeals and affirmed the convictions in a decision by a three-judge panel. *Robinson v. Commonwealth*, 45 Va.App. 592, 622, 612 S.E.2d 751, 765 (2005). The Robinsons later sought and were granted a rehearing en banc. *Robinson v. Commonwealth*, 46 Va.App. 23, 24, 614 S.E.2d 667, 667 (2005).

Sitting en banc, the Court of Appeals held that the Robinsons had impliedly consented to have the public, including police officers, "enter the driveway and front sidewalk" of their property, and that Officer Cox did not exceed the scope of this consent either at the point he observed the juveniles holding beer bottles or when he drove his car onto the cement pad by the garage.[1] *Robinson v. Commonwealth*, 47 Va.App. 533, 549-53, 557, 625 S.E.2d 651, 658-59 (2006). The Court of Appeals further held that Officer Cox's subjective intent was "irrelevant under the circumstances of this case." *Id.* at 555, 625 S.E.2d at 661.

The Court of Appeals rejected an argument made by George that when Officer Cox saw the juveniles with beer bottles, he should have "left the property or otherwise secured the premises and then obtained a

1. Upon rehearing en banc, the Commonwealth conceded that the driveway was within the curtilage of the Robinsons' home and this question was, therefore, not before the entire Court of Appeals. *Robinson*, 47 Va.App. at 542, 625 S.E.2d at 655.

search warrant." *Id.* at 543, 625 S.E.2d at 656. The Court of Appeals concluded that there were exigent circumstances, including possible destruction of evidence and fleeing suspects, and that Officer Cox did not manufacture these circumstances, because "the development of probable cause and the creation of the exigencies were virtually contemporaneous." *Id.* at 561-62, 625 S.E.2d at 665. The Court of Appeals affirmed the Robinsons' convictions. *Id.* at 562, 625 S.E.2d at 665.

The Robinsons filed separate petitions for appeal. We awarded both appeals and consolidated the cases for our consideration.

DISCUSSION

We begin by reviewing principles established by the United States Supreme Court regarding the Fourth Amendment protection afforded residents and occupants of a dwelling against unreasonable searches and seizures. The "Fourth Amendment protects the curtilage of a house and ... the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). When government agents conduct a search or seizure within protected areas of a dwelling without a warrant such actions are presumptively unreasonable, *Payton v. New York*, 445 U.S. 573, 586-87, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), and unlawful unless they are supported by both probable cause and exigent circumstances. *Kirk*

v. Louisiana, 536 U.S. 635, 638, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002).

The Supreme Court has not addressed what expectation of privacy a resident of a dwelling has in those areas of the curtilage, such as driveways and sidewalks, that are generally used by the public to contact the resident. However, a number of federal and state courts have held that a resident of a dwelling impliedly consents to a police officer entering the curtilage to contact the dwelling's residents. This implied consent has the effect of deeming such an entry into the curtilage a reasonable intrusion into an area otherwise protected by an expectation of privacy under the Fourth Amendment. *See, e.g., United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir.2006); *United States v. Taylor*, 90 F.3d 903, 909 (4th Cir.1996); *Davis v. United States*, 327 F.2d 301, 303 (9th Cir.1964); *State v. Christensen*, 131 Idaho 143, 953 P.2d 583, 587 (1998); *City of Eugene v. Silva*, 198 Or.App. 101, 108 P.3d 23, 27 (2005). Implied consent can be negated by obvious indicia of restricted access, such as posted "no trespassing" signs, gates, or other means that deny access to uninvited persons. *See, e.g., Christensen*, 953 P.2d at 587-88.

We now turn to the specific issues raised by the Robinsons in their appeals.

IMPLIED CONSENT

The Robinsons argue that the Court of Appeals erred in holding that Officer Cox did not exceed the scope of implied consent to enter the curtilage of their home. The Robinsons do not challenge the doctrine

of implied consent but, instead, challenge the standards for its application articulated by the Court of Appeals.

Elisa maintains that a police officer's subjective intent at the moment of entry onto the curtilage of a dwelling is relevant in determining whether the officer acted within the scope of the officer's implied consent. Elisa contends that "[o]ne impliedly consents only to the approach to the front door to knock and make inquiry." Thus, she asserts, an officer has implied consent "to go to the entrance of the home only by the most direct route and only if he is acting in good faith to contact the owners of the property for a purpose such as asking questions of the occupants."

George concedes that Officer Cox had implied consent to enter the driveway. George argues, however, that once Officer Cox was on the property and "actively searching for evidence of a crime within a constitutionally protected area," Cox's "legitimate reason" for entering the property, to contact the Robinsons, was "revoked," thereby rendering Cox's presence unlawful. George further argues that implied consent could not extend beyond the point where the path to the front door intersected the driveway absent the development of "a new legitimate reason."

Both Elisa and George urge us to adopt a bright line rule that the scope of implied consent is limited to the most direct path to the front door of a dwelling to "knock and talk" with one of its residents. Elisa asserts that Officer Cox's failure to comply with this rule rendered his initial entry onto the curtilage unconstitutional. George argues that Officer Cox's

actions became illegal when, after lawfully entering the property, he failed to proceed directly to the front door.

In resolving these issues, we first consider whether an officer's subjective intent is relevant to a determination of whether the officer's entry onto the curtilage of a dwelling was constitutional under the implied consent doctrine. Neither the United States Supreme Court nor this Court has addressed this question. We observe, however, that established jurisprudence concerning the constitutionality of police searches provides little, if any, support for application of a subjective standard in determining the constitutionality of an entry conducted pursuant to the doctrine of implied consent.

The United States Supreme Court has repeatedly rejected any consideration of the subjective motivation of a law enforcement officer in determining whether police searches were constitutionally infirm and, instead, has relied on an objective view of the facts and circumstances of each particular case. *See, e.g., Arkansas v. Sullivan*, 532 U.S. 769, 771-72, 121 S.Ct. 1876, 149 L.Ed.2d 994 (2001) (reversing granting of motion to suppress based on officer's alleged "improper subjective motivation"); *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n. 3, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983) (rejecting argument that search was unlawful because officers' intent in boarding vessel was other than that contemplated by statute which authorized officers to board to examine vessel's documentation); *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978) ("[T]he fact that the officer does

not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action").[2]

The Supreme Court recently reiterated this position in a case decided four months after the Court of Appeals issued its opinion in the present case. In *Brigham City v. Stuart*, __ U.S. __, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), the Court was asked to consider the constitutionality of a search conducted after police officers went to a private residence in response to a report of a loud party. When the officers arrived at the residence, they heard shouting coming from inside the house, proceeded down the driveway to investigate, and entered the backyard after observing juveniles drinking alcoholic beverages there. Once in the backyard, the officers observed, through a screen door and a window, an altercation occurring inside the house. Acting without a warrant, the officers entered the residence in an attempt to halt the altercation. The officers later arrested the individuals inside the house for various offenses,

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2. The exception to this rule involves searches "undertaken pursuant to a general scheme without individualized suspicion," in which the Court has examined the "programmatic purposes" of the action. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). In the present case, Elisa argues that the police action at her home constituted a "programmatic" search, thereby making Officer Cox's subjective intent relevant. Because Elisa did not raise this argument to trial court or the Court of Appeals, we do not address it here. Rule 5:25.

including disorderly conduct and contributing to the delinquency of a minor. __ U.S. at __, 126 S.Ct. at 1946.

The defendants moved to suppress all evidence obtained after the officers entered the home, arguing that the officers' warrantless entry violated the Fourth Amendment. The defendants asserted that the "emergency aid" exception to the warrant requirement was inapplicable because the officers did not intend to assist injured individuals in the home, and "were more interested in making arrests than quelling violence." — U.S. at __, 126 S.Ct. at 1948.

The Supreme Court unanimously rejected this argument, stating that, "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.' . . . The officer's subjective motivation is irrelevant." __ U.S. at __, 126 S.Ct. at 1948 (quoting *Scott*, 436 U.S. at 138, 98 S.Ct. 1717). Focusing solely on the objective facts presented, the Court concluded:

> It therefore does not matter here-even if their subjective motives could be so neatly unraveled-whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.

Stuart, __ U.S. at __, 126 S.Ct. at 1948.

Although the holding in *Stuart* was based on the "emergency aid" exception to the warrant

requirement, the Court's rejection of a subjective intent analysis did not rely exclusively on cases applying that particular exception. The Court also relied on cases involving an officer's physical examination of a bus passenger's "carry-on luggage," *Bond v. United States*, 529 U.S. 334, 338 n. 2, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000), a traffic "stop" and resulting seizure of drugs, *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), claims of excessive force, *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and government wiretapping and telephone surveillance, *Scott*, 436 U.S. at 138, 98 S.Ct. 1717. *See Stuart*, __ U.S. at __, 126 S.Ct. at 1948. And, as indicated above, in several other cases the Court likewise has rejected consideration of an officer's subjective intent. Thus, we do not read the holding in *Stuart* as limited to application of the emergency aid exception.

We conclude that the holdings in the above cases, when considered collectively, counsel against consideration of a police officer's subjective intent in determining the legality of the officer's actions. Because a contrary interpretation of these holdings would directly conflict with the Supreme Court's recent guidance in *Stuart*, we hold that the Court of Appeals did not err in concluding that Officer Cox's subjective intent was irrelevant to a determination of whether he exceeded the scope of the implied consent in conducting the challenged search and seizures.

Our conclusion is not changed by other cases cited by the Robinsons involving the implied consent

doctrine: *Rogers v. Pendleton*, 249 F.3d 279 (4th Cir.2001); *Alvarez v. Montgomery Cty.*, 147 F.3d 354 (4th Cir.1998); *United States v. Taylor*, 90 F.3d 903 (4th Cir.1996); *United States v. Bradshaw*, 490 F.2d 1097 (4th Cir.1974); and *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir.2003). Although these cases state that an officer does not violate the Fourth Amendment by entering onto private property for the limited purpose of contacting, interviewing, or speaking with an occupant of the property, the cases do not address the converse proposition advanced by the Robinsons: that if an officer subjectively intends to do something other than make these kinds of contacts, the officer's entry onto private property constitutes a violation of the Fourth Amendment. The subjective intent of the officers when entering the premises was not at issue in any of these cases. Moreover, the conclusion urged by the Robinsons would conflict with the several decisions of the Supreme Court that we have already noted.

We also observe that in the present case, the trial court concluded that the officer's purpose in entering the Robinsons' property was to investigate a report of juveniles consuming alcoholic beverages. Because the Robinsons did not assign error to this factual finding, we accept the trial court's conclusion that Officer Cox's purpose was investigatory in nature. An investigation may include, as George's counsel agreed at the suppression hearing, contacting the occupants of a residence and asking them questions. In this case, before Officer Cox could contact the Robinsons, intervening circumstances caused him to pursue a different course of action.

Accordingly, we reject the Robinsons' suggestion that we adopt a bright line rule holding that the implied consent given by a resident of a dwelling is limited in all cases to entry onto the premises to "knock and talk" to the resident, and that any deviation from this purpose precludes application of the implied consent doctrine. As the United States Court of Appeals for the Fourth Circuit stated in *Alvarez* when rejecting the same bright line rule advocated by the defendants in that case:

> The textual "touchstone of the Fourth Amendment is reasonableness." When applying this basic principle, the Supreme Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."

147 F.3d at 358 (citations omitted).

PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES

We next address an argument made by both Elisa and George that when Officer Cox reached the path leading from the driveway to the front door, he lacked probable cause and there were no exigent circumstances to justify a search of the backyard or the seizure of any evidence or person in that location without a warrant. According to the Robinsons, evidence thus obtained by Officer Cox after entering the backyard or garage area was the result of an

unconstitutional search and should have been suppressed.[3]

On review, we will not disturb the factual findings of the trial court unless plainly wrong or unsupported by the evidence. *Mercer v. Commonwealth*, 259 Va. 235, 243, 523 S.E.2d 213, 217 (2000). The issue of whether an officer acted with probable cause and under exigent circumstances, however, is a mixed question of fact and law that we review de novo. *See Brown v. Commonwealth*, 270 Va. 414, 419, 620 S.E.2d 760, 762 (2005).

We conclude that the record supports the trial court's factual finding that Officer Cox had not passed the path leading to the front door when he saw juveniles in the backyard holding beer bottles. We also hold that Officer Cox acted with probable cause and under exigent circumstances when he proceeded past the path and into the garage area and backyard without a warrant.

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3. Elisa assigns error to the Court of Appeals' finding that the plain view doctrine justified Cox's actions. George assigns error to the trial court's holding on the " 'plain view doctrine,' as interpreted by the trial court." Our review of the trial court's letter opinion, however, indicates that although the trial court characterized its analysis as a "plain view" inquiry, the court focused on the existence of probable cause and exigent circumstances. Accordingly, while we address the existence of probable cause and exigent circumstances, we do not consider application of the plain view doctrine.

Appendix A

1. Probable Cause

At the hearing on the Robinsons' motions to suppress, the Commonwealth presented as exhibits photographs showing the Robinsons' property from various vantage points along the driveway. On direct examination, Officer Cox identified on one of the exhibits a bush located immediately before the path leading to the front door. He testified that when he was "about at th[at] point" and still in his vehicle, he saw what appeared to be juveniles holding beer bottles in the vicinity of a pine tree in the backyard. On cross examination, Officer Cox testified that although he was able to see people standing by the pine tree before he reached the path to the front door, he was unable to determine that they were juveniles holding beer bottles until he actually reached the path. In response to questions posed by the trial court, Officer Cox testified that he was "at the bush" when he saw the two juveniles holding beer bottles.

Because there is evidence in the record to support the trial court's finding that Officer Cox had not passed the path when he saw the juveniles holding beer bottles, we cannot say the trial court's factual conclusion was plainly wrong. Taking the finding as true, we therefore conclude that Officer Cox had probable cause to enter the backyard, after having observed a crime in progress, before he reached the path to the front door. *See Taylor v. Commonwealth*, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981)("[P]robable cause exists when the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, alone are sufficient to warrant a person of reasonable

caution to believe that an offense has been or is being committed.").

In order to proceed further without obtaining a warrant, however, exigent circumstances were also required. *Horton v. California,* 496 U.S. 128, 137 n. 7, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)("[N]o amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' ")(quoting *Coolidge v. New Hampshire,* 403 U.S. 443, 468, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)); *see also, Payton,* 445 U.S. at 587-88, 100 S.Ct. 1371 ("[A]bsent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional."). Therefore, we consider the arguments advanced by the Robinsons that exigent circumstances were not present when Officer Cox entered the backyard.

2. Exigent Circumstances

On brief, both George and Elisa argue that Officer Cox entered the backyard unlawfully because, even if he had probable cause, there were no exigent circumstances. George and Elisa further contend that, even if exigent circumstances did exist, such circumstances were manufactured by Officer Cox and thus did not justify his entry into the backyard.[4]

4. Although Elisa presents this argument to this Court, the Court of Appeals' en banc opinion notes that during oral argument she conceded that "if Officer Cox was legitimately present on the driveway, his subsequent entry into the backyard would be permissible because the officer had both probable cause and exigent circumstances." *Robinson,* 47 Va.App. at 556 n. 10, 625 S.E.2d at 662 n. 10. (Cont'd)

George claims that at the moment when Officer Cox passed the path to the front door and entered the garage area, he could not have reasonably concluded that exigent circumstances were present because the suspects had not yet seen him approaching. George asserts Officer Cox entered the garage area for the express purpose of causing a panicked reaction among the juveniles, a reaction Officer Cox himself described as "the effect when you flick on a light in a dark kitchen, and the cockroaches scatter." George states this provocative conduct caused the juveniles to panic and run and thereby created the exigent circumstances Officer Cox used to justify his warrantless entry.

A determination of whether exigent circumstances justify a warrantless entry is not based on an analysis of the circumstances considered in hindsight, but is focused on review of the "circumstances as they reasonably appeared to trained law enforcement officers to exist when the decision to enter was made." *Verez v. Commonwealth*, 230 Va. 405, 411, 337 S.E.2d 749, 753 (1985) (quoting *Keeter v. Commonwealth*, 222 Va. 134, 141, 278 S.E.2d 841, 846 (1981)). The test for whether exigent circumstances were present is "fact-specific," *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), and we have not previously attempted to delineate a "final and comprehensive list of all exigent circumstances which might justify a warrantless entry." *Verez*, 230 Va. at

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(Cont'd)

However, because George also claims that Officer Cox manufactured the exigency in this case, we must consider this issue on appeal regardless of any concession by Elisa.

410, 337 S.E.2d at 753. We have, however, recognized that the following factors have been considered relevant by other courts:

> (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present in the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit.

Id. at 410-11, 337 S.E.2d at 753 (citations omitted).

Officer Cox testified that after the juveniles observed him in his vehicle, they yelled "cops," dropped their beer bottles, and began running toward the woods behind the house. When Officer Cox pulled his car into the garage area, he could still see "kids running towards the woods." He could also see patio furniture covered with beer bottles, "[b]eer bottles spread throughout the yard, and kids running away.

Officer Cox stepped out of his vehicle and "yelled for everybody to stop," but "[n]obody did." He then entered the backyard to locate the juvenile hosting the party. Officer Cox indicated that his intent was to "find out what was going on," and that he was concerned about the juveniles' safety and "wanted to find out who they were, so [the police] could contact parents."

Based on this testimony, we conclude that exigent circumstances justified Officer Cox's entry into the garage area and the backyard. At that time, he had already observed the juveniles consuming alcoholic beverages at the party. Had Officer Cox left the property to obtain a warrant after the juveniles began to run from the yard, there is a high probability that evidence of the crimes would have been destroyed by the time he returned. Moreover, given the number of cars parked on the street and in the driveway, Officer Cox could reasonably have believed that a number of juveniles in attendance may have been inebriated and could have injured themselves or others, either by running into the woods at night or by attempting to drive away from the residence. These factors constituted exigent circumstances and justified Officer Cox's warrantless entry into the backyard.[5]

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5. Other courts have determined that exigent circumstances may be created by unsupervised juveniles who are under the influence of alcohol. *See, e.g., Radloff v. City of Oelwein*, 380 F.3d 344, 348 (8th Cir.2004) ("Exigent circumstances existed both because of the loud noise created by the party and because of the threat to public safety if the juveniles left the house in cars while under the influence of alcohol."); *Huset v. City of Roseville*, No. 05-295, 2006

(Con t'd)

We find no merit in the argument that Officer Cox manufactured the exigency. As discussed earlier, Officer Cox's testimony establishes that he first identified juveniles holding beer bottles when he was in his vehicle at a point before the driveway intersected the path to the front door, and that the juveniles observed him and began to run away when he was still "approximately in [that] location."

Although there is no direct testimony regarding the period of time that elapsed between Officer Cox's sighting of the juveniles and the time that they, in turn, observed him and began to run, Officer Cox's testimony suggests that any intervening time period was negligible. As the Court of Appeals stated, the "development of probable cause and the creation of exigencies were virtually contemporaneous." *Robinson*, 47 Va.App. at 561-62, 625 S.E.2d at 665. Given that there was no significant period of time between the moment Officer Cox first saw illicit activity and the occurrence of the ensuing exigencies, we agree with the Court of Appeals' holding that Officer Cox did not have a meaningful opportunity to leave the Robinsons' property to obtain a warrant before proceeding further.

As other courts have recognized, the lack of such

(Cont'd)

WL 2472186, *4, 2006 U.S. Dist. LEXIS 60165, *12 (D.Minn.2006) (finding that exigent circumstances existed when officers found juveniles drinking at a party, and noting " 'it would have been unreasonable . . . to quarantine the juveniles' cars during the period of time [it] would have taken to obtain a warrant' ") (quoting *Radloff*, 380 F.3d at 348).

opportunity to secure a search warrant strongly counsels against a conclusion that the police manufactured exigent circumstances. *See, e.g., United States v. Rico*, 51 F.3d 495, 502-03 (5th Cir.1995) (rejecting manufactured exigency argument because officers "clearly lacked sufficient time between the point at which the circumstances that the agents claim motivated them to enter [one] residence and the point at which probable cause to enter [a second] residence developed"); *United States v. Webster*, 750 F.2d 307, 327 (5th Cir.1984) ("Our first concern in analyzing a claim of manufactured exigency is whether agents could have obtained a search warrant prior to the development of the exigent circumstances upon which they relied."). To suggest that an officer under the present circumstances was required to leave the property to obtain a warrant or to approach the front door to question the occupants ignores the reality of the situation, namely, that the evidence of juveniles consuming alcohol on the premises would have been destroyed or otherwise compromised, and that the juveniles and possibly other motorists could have been injured, in the absence of immediate and direct action. Accordingly, we reject the Robinsons' arguments that Officer Cox's warrantless search was undertaken in the absence of probable cause and exigent circumstances.

Appendix A

CONCLUSION

For the reasons expressed, we will affirm the judgment of the Court of Appeals.

Record No. 060417 *Affirmed.*

Record No. 060426 *Affirmed.*

APPENDIX B — OPINION OF THE *EN BANC* COURT OF APPEALS OF VIRGINIA DATED JANUARY 31, 2006

COURT OF APPEALS OF VIRGINIA

Record Nos. 2474-03-2, 2539-03-2.

Jan. 31, 2006.

Elisa Kenty ROBINSON

v.

COMMONWEALTH of Virginia.

George Fisher Robinson

v.

Commonwealth of Virginia.

Present: FITZPATRICK, C.J., BENTON, ELDER, FRANK, HUMPHREYS, CLEMENTS, FELTON, McCLANAHAN, HALEY, JJ., and BUMGARDNER, Ret. J.*

UPON REHEARING EN BANC

HUMPHREYS, Judge.

Appellants George F. Robinson and Elisa K. Robinson (collectively, "the Robinsons") appeal their multiple convictions for contributing to the

* Judge Bumgardner participated in the hearing and decision of this case prior to the effective date of his retirement on December 31, 2005.

delinquency of a minor, a violation of Code § 18.2-371. Elisa Robinson contends that the trial court erred in denying her motion to suppress, reasoning that, because the investigating police officer was located in the curtilage of their home when he witnessed the illicit activity, the resulting search violated her Fourth Amendment right to be free from unreasonable searches and seizures. George Robinson, in contrast, argues that, although the police officer did not violate the Fourth Amendment when he initially entered the premises, the officer lacked the exigent circumstances necessary to permit his further intrusion onto the property. For the following reasons, we disagree with both appellants' arguments and, therefore, affirm their convictions.

I. BACKGROUND

In accord with our usual standard of review, on the appeal of a denial of a motion to suppress, we view the evidence and all reasonable inferences flowing from the evidence in a light most favorable to the Commonwealth, the party prevailing below. *Garcia v. Commonwealth*, 40 Va.App. 184, 189, 578 S.E.2d 97, 99 (2003); *Sabo v. Commonwealth*, 38 Va.App. 63, 69, 561 S.E.2d 761, 764 (2002). So viewed, the evidence in this case establishes the following.

On August 16, 2002, the Albemarle County Police Department received three separate telephone calls reporting an alleged underage drinking party at the Robinsons' home. Corporal Scott Cox was dispatched to investigate these allegations, and he arrived at the Robinsons' home at approximately 11:00 p.m. From

the state road in front of the house, Officer Cox saw between ten and twenty cars parked on the state road, and he also saw two or three cars parked on the left-hand side of the driveway. From that position, Officer Cox could also see the house, the front porch, the front door, and the front yard, although he could not see the backyard or the end of the driveway. The floodlights above the front door were turned on, and the lights along the sidewalk leading to the front door were also illuminated.

Officer Cox, who was driving a marked police car with its headlights on, "got on the radio" and told the other officers in the area to "start heading this way" because "[i]t appears that there's a party." Officer Cox then turned into the driveway and started to drive towards the house. Almost immediately after pulling into the driveway, Officer Cox saw several additional parked vehicles near the right side of the driveway, as well as "several parked vehicles near the side of the house." Officer Cox continued up the driveway in his police car. From his position inside the police car, he began to see some "activity" in the backyard. Before reaching the point where the walkway to the front door intersects with the Robinsons' driveway, Officer Cox saw two individuals holding clear beer bottles. The individuals, both of whom appeared to be underage, were standing by a pine tree about seven or eight yards away from Officer Cox's police car. The two juveniles "looked at [Officer Cox], looked at the house, yelled 'cops,' dropped the beer bottles, and ran down a fence line toward the woods." Officer Cox then pulled his police vehicle behind a car parked by the garage, and he looked to his left. From that vantage point, "[h]e saw juveniles running toward the woods." Also, "[h]e

could see a patio table covered with beer bottles and noticed beer bottles strewn about the backyard." Officer Cox got out of his car, "yelled for people to stop running, and radioed other officers who were waiting off the property that kids were running east into the woods."

After radioing the other officers, Officer Cox proceeded into the backyard "to look for the juvenile host." According to Officer Cox, he went into the backyard because he "[w]anted to find out what was going on, [and] find out who the people were that were running away," because he "was worried for their safety." After speaking with one of the party attendees, Officer Cox then "walk[ed] up to the back door of [the] house" and knocked on a clear glass sliding door. From outside the residence, he could see "two adults sitting at the kitchen table."

The Robinsons were arrested, and each was charged with nineteen counts of contributing to the delinquency of a minor. Both parties filed a motion to suppress, contending that Officer Cox was unlawfully present on their property when he viewed the illicit activity.

During the suppression hearing, Officer Cox testified that his police car was next to a bush planted by the front sidewalk when he "clearly" saw "two male juveniles standing on the other side of the tree holding beer bottles." To clarify the position in the driveway from which the officer observed the juveniles, the trial court asked Officer Cox, "So you were at the bush when you saw the two individuals?" Officer Cox responded, "That's right."

Appendix B

By letter opinion dated August 4, 2003, the trial court held that Officer Cox "planned to enter the property to investigate the allegations of underage consumption of alcohol." The trial court also observed that, "[a]s Cox went down the driveway, he could not see the backyard or the garage," but that "[h]e could see the house, the front yard, and the front porch." Additionally, the trial court found that "[t]here were no signs posted"-such as a "no trespassing" sign-at the entrance to the driveway.

Based on this evidence, the trial court found that the Robinsons' driveway was not part of the curtilage of the house and, therefore, concluded that "Cox's presence there [did] not implicate the Fourth Amendment." The court additionally held that Officer Cox's presence in the Robinsons' driveway was justified by the officer's right to conduct a "knock and talk," that is, to approach a home and knock on the front door to speak with an occupant. Under either of the preceding rationales, the trial court concluded that "Cox was in a lawful place in the driveway" when he observed the two juveniles drinking beer, and his observations were therefore admissible pursuant to the plain view exception to the warrant requirement. Finally, the trial court concluded that Officer Cox's entry into the backyard was justified because he had both probable cause to believe that a crime was being committed and exigent circumstances "given the likelihood of evidence being destroyed and juveniles running away." Accordingly, the trial court denied the Robinsons' motions to suppress.

Appendix B

The trial court convicted each appellant of nine counts of contributing to the delinquency of a minor. Both parties appealed their convictions to this Court.

II. PROCEDURAL HISTORY

On appeal, a three-judge panel, with one judge dissenting, affirmed the Robinsons' convictions. *See Robinson v. Commonwealth*, 45 Va.App. 592, 612 S.E.2d 751 (2005). The panel majority reasoned that, although the driveway was part of the curtilage of the home, Officer Cox's presence did not violate any reasonable expectation of privacy, and, therefore, his conduct did not implicate the Fourth Amendment. *See id.* By orders dated June 21, 2005, this Court granted the Robinsons' petitions for rehearing *en banc* and stayed the mandates of the panel opinion. *See Elisa Robinson v. Commonwealth*, 46 Va.App. 24, 614 S.E.2d 667 (2005); *George Robinson v. Commonwealth*, 46 Va.App. 23, 614 S.E.2d 667 (2005).

During the *en banc* oral arguments, the Commonwealth conceded that Officer Cox was located on the curtilage of the Robinsons' home when he observed the unlawful activity. Accordingly, this question-which was in dispute before the three-judge panel, *see Robinson*, 45 Va.App. at 604-07, 612 S.E.2d at 757-58-is no longer at issue on appeal. However, the Commonwealth maintains that, although Officer Cox intruded upon the curtilage, he did not violate the Fourth Amendment because, for the reasons stated in the majority panel opinion, the Robinsons

lacked a reasonable expectation of privacy in the area from which he viewed the illegal activity.[1]

Also during the *en banc* oral arguments, George Robinson conceded that he lacked a reasonable expectation of privacy in their driveway on the night in question. He argues, however, that the officer's further intrusion onto the property was unconstitutional, reasoning that the officer-once his suspicions of underage drinking had been validated-should have left the property or otherwise secured the premises and then obtained a search warrant. This argument was not previously raised before the three-judge panel and, thus, was not addressed in the panel opinion.[2]

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1. Upon rehearing *en banc*, the Commonwealth has apparently abandoned its argument that the Robinsons lacked a reasonable expectation of privacy in their driveway because portions of the driveway were viewable from the state road. *Cf. Robinson*, 45 Va.App. at 608-09, 612 S.E.2d at 759.

2. George Robinson's new argument-that the officer lacked the exigent circumstances necessary to permit his entry into the backyard-was not argued before the three-judge panel either on brief or during oral arguments. Indeed, it is questionable whether Robinson properly assigned error to the trial court's clear ruling that the officer's entry was constitutional because he possessed both probable cause and exigent circumstances. Specifically, the third assignment of error in Robinson's "Questions Presented," as enunciated in his petition for appeal, merely questions "Whether the 'plain view' doctrine authorized Sergeant Cox's entry into the Robinsons' backyard to seize evidence there." Notably absent from this assignment of

(Cont'd)

Elisa Robinson, in contrast, continues to maintain that she possessed a reasonable expectation of privacy in the driveway and, thus, argues that Officer Cox violated the Fourth Amendment when he entered the property without a warrant. However, Elisa Robinson concedes that, if the officer was legitimately present on the premises when he witnessed the illegal activity, the officer's further intrusion onto the property was justified because the officer possessed the requisite exigent circumstances.[3]

III. ANALYSIS

Although " '[w]e are bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them,' ... we review *de novo* the trial court's application of legal standards ... to the particular facts of the case." *McCracken v. Commonwealth*, 39 Va.App. 254, 258, 572 S.E.2d 493, 495 (2002) (*en banc*) (quoting *McGee v. Commonwealth*, 25 Va.App. 193, 198, 487 S.E.2d 259, 261 (1997) (*en banc*)) (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d

(Cont'd)
error is any mention of exigent circumstances or probable cause. However, because the assignment of error does question whether the officer's "entry into the Robinsons' backyard" was constitutionally permissible, we will assume for purposes of this opinion that Robinson's third "Question Presented" is sufficient to encompass the trial court's ruling that exigent circumstances justified the officer's entry into the backyard.

3. Of the three parties, then, Elisa Robinson is the only litigant who maintains a position consistent with that taken before the three-judge panel.

911 (1996)). Further, "[i]n reviewing a trial court's denial of a motion to suppress, 'the burden is upon [the appellant] to show that the ruling . . . constituted reversible error.' " *McGee*, 25 Va.App. at 197, 487 S.E.2d at 261 (quoting *Fore v. Commonwealth*, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980)).

For the reasons that follow, we hold that, contrary to Elisa Robinson's position, Officer Cox did not violate the Fourth Amendment when he drove up the driveway of the Robinsons' home. We further hold that, contrary to George Robinson's position, once the officer observed the teenagers fleeing from the backyard, his further intrusion onto the property was permissible pursuant to the exigent circumstances exception to the warrant requirement. Accordingly, we affirm both parties' convictions.

A. *Elisa Robinson: Implied Consent*

Upon rehearing *en banc*, Elisa Robinson[4] maintains that Officer Cox violated the Fourth Amendment when he entered the driveway of the property without first obtaining a search warrant. Initially, we agree that, "absent (1) exigent circumstances and probable cause or (2) consent, law enforcement agents cannot enter the curtilage of a person's home either to search or seize without previously obtaining a warrant." *Jefferson v. Commonwealth*, 27 Va.App. 1, 16, 497 S.E.2d 474, 481 (1998). Although Officer Cox possessed neither probable cause nor exigent circumstances which

4. For purposes of this subsection, Elisa Robinson will be referred to simply as "Robinson."

would justify a search when he initially entered the property, we hold that, on the night in question, Robinson impliedly consented to have members of the public-including police officers-enter the premises in an attempt to contact the residents of that property. Because Officer Cox had not exceeded the scope of this implied consent when he viewed the illicit activity, we affirm her convictions.

1.

It is generally recognized that, absent any affirmative attempts to discourage trespassers, owners or possessors of private property impliedly consent to have members of the general public intrude upon certain, limited areas of their property. As we have noted,

> "People commonly have different expectations, whether considered or not, for the access areas of their premises than they do for more secluded areas. Thus, we do not place things of a private nature on our front porches that we may very well entrust to the seclusion of a backyard, patio or deck. In the course of urban life, we have come to expect various members of the public to enter upon such a driveway, e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends. Any one of them may be reasonably expected to report observations of criminal activity to the police."

Shaver v. Commonwealth, 30 Va.App. 789, 796, 520 S.E.2d 393, 397 (1999) (quoting *State v. Corbett*, 15 Or.App. 470, 516 P.2d 487, 490 (1973)).

This invitation, where it exists, extends only to those areas of the property that would be used when approaching the residence in an ordinary attempt to speak with the occupants. *See id.* Thus, areas of the curtilage that a visitor could reasonably be expected to cross when approaching the front door-for example, the driveway, front sidewalk, and front porch-are generally exempted from Fourth Amendment protection. *See, e.g., State v. Clark*, 124 Idaho 308, 859 P.2d 344, 349 (1993) ("There is an implied invitation for the public to use access routes to the house, such as parking areas, driveways, sidewalks, or pathways to the entry, and there can be no reasonable expectation of privacy as to observations which can be made from such areas."). As a result, if the property owner has impliedly consented to have members of the public use a particular "path" when attempting to access his home, he has waived any reasonable expectation of privacy in areas of the curtilage associated with that "path." *See id.*

By extension, the same implied consent is extended to police officers who enter the curtilage and, while on the premises, restrict their conduct to those activities reasonably contemplated by the homeowner. *See Shaver*, 30 Va.App. at 796, 520 S.E.2d at 397 (" 'If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so.' " (quoting *Corbett*, 516 P.2d at 490)); *see also State v. Cada*, 129

Idaho 224, 923 P.2d 469, 477 (1996) ("[T]he direct access routes to the house, including parking areas, driveways and pathways to the entry, are areas to which the public is impliedly invited, and [ ] police officers restricting their activity to such areas are permitted the same intrusion and the same level of observation as would be expected from a 'reasonably respectful citizen.' "); *State v. Gabbard*, 129 Or.App. 122, 877 P.2d 1217, 1221 (1994) ("An officer's right to go to the front door of a house is based on implied consent to allow visitors to take reasonable steps to make contact with the occupant.").[5] Accordingly, "[w]hen police enter onto private property ... and restrict their entry to places that other visitors would be expected to go, such as walkways, driveways, or porches, any observation made from these areas is permissible under the Fourth Amendment." *Trimble v. State*, 816 N.E.2d 83, 88 (Ind.Ct.App.2004); *see also State v. Maxfield*, 125 Wash.2d 378, 886 P.2d 123, 134 (1994) ("If a law enforcement officer or agent does not go beyond the area of the residence that is impliedly open to the public, such as the driveway, the walkway, or an access route leading to the residence, no privacy interest is invaded.").

The landowner's implied consent is generally presumed to exist absent evidence of an affirmative intent to exclude the public from the premises. *See, e.g., People v. Kozlowski*, 69 N.Y.2d 761, 513 N.Y.S.2d 101, 505 N.E.2d 611, 612 (1987) ("Absent evidence of intent to exclude the public, the entryway to a person's house offers implied permission to approach

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5. *See generally* 1 Wayne R. LaFave, *Search and Seizure* § 2.3(f), at 600-03 (4th ed.2004).

and knock on the front door."); *State v. Somfleth*, 168 Or.App. 414, 8 P.3d 221, 227 (2000) ("A homeowner can abrogate the presumption of implied consent to approach the front door by undertaking sufficient steps to exclude casual visitors from the front yard."). Here, then, we must consider whether, under the totality of the circumstances, Robinson affirmatively intended to exclude members of the public from her premises. *See generally State v. Wyatt*, 131 Idaho 562, 961 P.2d 653, 656 (1998) ("The determination whether a particular citizen had a legitimate expectation of privacy depends upon the unique facts of each case. We therefore examine the citizen's efforts to protect his own privacy from observation by the general public, taking into account norms of social conduct and the nature of the premises.").[6]

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6. We note that the issue of whether a property owner gave law enforcement officers free and voluntary consent to search the premises is a question of fact. *See, e.g., Hargraves v. Commonwealth*, 37 Va.App. 299, 307, 557 S.E.2d 737, 741 (2002) ("The presence of consent is, however, a factual question."). Here, however, we are not questioning whether Robinson extended her consent to *search* the property, but rather, whether, under the totality of the circumstances, she had rescinded her implied consent to *enter* that property. Because the existence of this implied consent is presumed to exist absent evidence of an affirmative intent to exclude the public from the premises, *see Somfleth*, 8 P.3d at 227, the implied invitation to enter arises by operation of law. Accordingly, the issue of whether, under the totality of the circumstances, Robinson impliedly consented to have members of the public enter her property is a mixed question of law and fact that is properly reviewable on appeal. *See id.* at 225 (where the relevant facts were undisputed, classifying the issue of whether property owner extended his implied consent for members of the public to enter his backyard as "purely legal").

Appendix B

Factors that may be particularly relevant to this determination include, *inter alia:* (1) whether the homeowner has erected any physical barriers, such as gates or fences, across the entrance to the property, and (2) whether the homeowner has posted signs, such as "no trespassing" or "private property" signs, indicating a desire to exclude the public from the premises. *See, e.g., State v. Christensen,* 131 Idaho 143, 953 P.2d 583 (1998) (no implied invitation to enter where the entrance to the driveway was obstructed by a closed gate posted with a "no trespassing" sign); *State v. Pacheco,* 101 S.W.3d 913, 919 (Mo.Ct.App.2003); *State v. McIntyre,* 123 Or.App. 436, 860 P.2d 299, 301 (1993) ("[C]ourts must consider all surrounding circumstances, including the existence of a fence, to determine the residents' intent."); *State v. Ridgway,* 57 Wash.App. 915, 790 P.2d 1263, 1265 (1990) (holding that marijuana recovered from doorstep should have been suppressed because police observed the marijuana after walking around a closed gate and evading guard dogs while approaching the house).

Here, Robinson did not erect any physical barriers barring entry onto her property. There were no gates, fences, wires, highway cones, or other obstacles indicating that members of the public were not welcome to use the driveway and front sidewalk in an effort to speak with the occupants of the premises. Nor did she post any signs indicating that the public in general-or police officers in particular-were not welcome to enter the property and approach the front door. Considering the totality of the circumstances, we conclude that, on the night in question, Robinson impliedly consented to have members of the general

public-including law enforcement officers-enter the driveway and front sidewalk of her premises.

Although we hold that Robinson extended an implied invitation to the public to enter her property and approach the front door, we must also consider whether Officer Cox's conduct on the night of the party exceeded the scope of that implied consent. Ultimately, whether the officer exceeded the scope of the implied consent "cannot be determined by a fixed formula," but must instead "be based on the facts and circumstances of each case." *People v. Thompson*, 221 Cal.App.3d 923, 270 Cal.Rptr. 863, 874 (1990).[7]

"[U]nder normal circumstances, uninvited visitors coming to a residence to speak with an owner or resident are expected to come to the residence's most direct, obvious, and prominent entryway, which in most cases is the front door." *Trimble*, 816 N.E.2d at 88. These visitors "are also expected to leave by the same route after knocking on the front door and receiving no response," unless the "nature of the circumstances surrounding the visit" indicate that the visitor "could reasonably be expected to seek out residents through areas other than the front door." *Id.* Generally, "a substantial and unreasonable departure from the normal access route will exceed the scope of the implied invitation and intrude upon

7. Relevant factors that have been identified include "whether the officer (1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct route to the house; (5) attempted to talk with the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally." *State v. Ross*, 91 Wash.App. 814, 959 P.2d 1188, 1190 (1998).

a constitutionally protected privacy interest." *Clark*, 859 P.2d at 350.

Similarly, entering the property late at night, especially if accompanied by the use of subterfuge, may exceed the scope of the implied invitation. As noted by one court,

> Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm. As compared to open daytime approaches, surreptitious searches under the cover of darkness create a greater risk of armed response-with potentially tragic results-from fearful residents who may mistake the police officers for criminal intruders.

Cada, 923 P.2d at 478; *see also Brown v. State*, 392 So.2d 280, 284 (Fla.Dist.Ct.App.1980) (finding that police violated defendant's reasonable expectation of privacy when they entered defendant's driveway without a warrant at 1:45 a.m. and arrested him); *State v. Cloutier*, 544 A.2d 1277, 1280 (Me.1988) (noting that "the implied invitation extends only to recognized access routes ... and to *reasonable times of day*" (emphasis added)); *State v. Myers*, 117 Wash.2d 332, 815 P.2d 761, 769 (1991) (noting that whether a police officer enters a premises during the daylight hours is relevant in determining whether the scope of the implied consent has been exceeded).

Also, although law enforcement officers who "enter areas of the curtilage which are impliedly open" to the public are "free to keep their eyes open," *State v. Seagull*, 95 Wash.2d 898, 632 P.2d 44, 47 (1981), an officer who implements an overly intrusive means of investigation, such as the use of binoculars or other sensory-enhancing devices, may exceed the scope of the implied consent. *See Cada*, 923 P.2d at 477 ("The scope of the implied invitation to enter areas of the curtilage that provide direct access to the house . . . may be exceeded where officers employ a particularly intrusive method of viewing."); *Cloutier*, 544 A.2d at 1280 (holding that the defendant had no reasonable expectation of privacy in a marijuana plant where, *inter alia*, the officer "detected the contraband by means of his natural senses"). *But cf. State v. Lee*, 633 P.2d 48, 51 (Utah 1981) ("[T]he use of a flashlight to assist the natural vision at night does not make an 'observation' a 'search.' ").

Here, considering the totality of the circumstances, we conclude that Officer Cox did not exceed the scope of Robinson's implied consent to enter the premises and approach the front door of her home. Officer Cox entered the driveway, began to drive toward the residence, and, *before* he reached the area of the driveway where the front walk intersects with the driveway, he saw the minors drinking in the backyard. At that point, Officer Cox had gone no further than any member of the public would have gone in an attempt to contact the owners of the property. He did not stray from the "path" leading directly from the road to the front door (i.e., the driveway and the front sidewalk), nor did he attempt

to conduct a general search of the premises through use of an overly intrusive means of investigation.

Moreover, although Officer Cox parked his police car in the parking area by the garage, those portions of the curtilage impliedly open to the public encompass areas "that other visitors would be expected to go," *Trimble*, 816 N.E.2d at 88, including "parking areas" in which a visitor might reasonably be expected to leave his vehicle when attempting to contact the residents of the property. *See Cada*, 923 P.2d at 477 ("[T]he direct access routes to the house, *including parking areas*, driveways and pathways to the entry, are areas to which the public is impliedly invited . . . ." (emphasis added)); *Clark*, 859 P.2d at 349 ("There is an implied invitation for the public to use access routes to the house, *such as parking areas*, driveways, sidewalks, or pathways to the entry . . . ." (emphasis added)). Because the parking area by the garage is at the end of the driveway and directly adjacent to the front sidewalk, Robinson could reasonably expect a visitor to park his vehicle in that area when attempting to contact the residents of the home. Accordingly, Officer Cox did not exceed the scope of the implied consent when he pulled his car into the parking area by the garage.

Also, although Officer Cox entered the curtilage of Robinson's home at 11:00 p.m., a late hour of the evening, this entry did not necessarily exceed the scope of the implied consent. "Under some circumstances, the mere fact that the intrusion was made late at night may be a factor suggesting that the police conduct was unduly intrusive." *State v. Morris*, 131 Idaho 562, 961 P.2d 653, 657 n. 3 (1998).

Here, however, the lights along Robinson's front sidewalk and the lights on the front porch were still illuminated. Also, multiple cars were parked along the driveway and on the public road in front of the house. These factors give rise to a reasonable inference that the landowner's implied consent to approach the front door of the residence had not yet been rescinded for the night.[8] Also, we note that Officer Cox drove up the driveway with his headlights turned on-the same way that any member of the general public would presumably have approached the house-rather than using subterfuge or the "cover of darkness" in an attempt to disguise his approach. *Compare Cada*, 923 P.2d at 478 (officers exceeded scope of implied consent where they engaged in a "clandestine intrusion . . . under cover of darkness in the dead of night"), *with Clark*, 859 P.2d at 346 (officers did not exceed scope of implied consent where the officers went to the front door of the residence at 10:00 p.m. to investigate a neighbor's complaint about a loud party).[9] Considering the totality of the circumstances, we conclude that, on the night in

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8. This inference is supported by the fact that various members of the public had, in fact, approached the residence and "crashed" the party on the night in question.

9. *See also Morris*, 961 P.2d at 657 n. 3 (noting that the "late hour" was "not such a factor in this case," reasoning that "[i]f the investigation had been delayed until the next day, the [subject of the investigation] might have been gone"); *Ross*, 959 P.2d at 1191 (finding that the officers exceeded the scope of an implied invitation where "the officers arrived in an unmarked car, in plain clothes, after midnight, and made no attempt to contact [the defendant] or otherwise notify him of their presence").

question, the implied invitation to enter Robinson's premises was still open even at this late hour, and Officer Cox did not exceed the scope of this implied consent when he drove up Robinson's driveway and parked his car in the parking area by the garage.

Robinson argues, however, that Officer Cox's subjective intent-specifically, to see if the party attendees "scattered" as he approached the house-renders the entry unconstitutional, reasoning that the officer subjectively intended to conduct a general search of the premises. Because a homeowner who impliedly consents to have law enforcement officers enter the property does not also consent to a general search of that property, Robinson concludes that Officer Cox exceeded the scope of the implied consent by entering the premises while subjectively intending to search the property.

Initially, we agree that, although a property owner's implied consent generally authorizes law enforcement officers to seek out the occupants of the residence in order to "investigate," *see, e.g., United States v. Hammett*, 236 F.3d 1054, 1059 (9th Cir.2001) ("Law enforcement officers may encroach upon the curtilage of a home for the purpose of asking questions of the occupants."), the scope of this implied consent does not also encompass the right to conduct a general search of the premises, *see, e.g., United States v. Bradshaw*, 490 F.2d 1097, 1100 (4th Cir.1974) (noting that the officer may not extend the scope of the implied consent to conduct "a search of such premises"); *see also Rogers v. Pendleton*, 249 F.3d 279, 288 (4th Cir.2001); *Alvarez v. Montgomery County*, 147 F.3d 354, 358 (4th Cir.1998). Thus, if a law enforcement

officer, while searching for evidence of illicit activity, strays from the "path" that is impliedly open to the public, he has exceeded the scope of the implied consent and, as a result, violated the Fourth Amendment.

However, the determination of whether a Fourth Amendment violation has occurred is based on " 'an objective assessment of the officer's actions . . . and not on the officer's state of mind at the time the challenged action was taken.' " *Limonja v. Commonwealth*, 8 Va.App. 532, 538, 383 S.E.2d 476, 480 (1989) (*en banc*) (quoting *Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 2783, 86 L.Ed.2d 370 (1985)); *see also Deer v. Commonwealth*, 17 Va.App. 730, 734, 441 S.E.2d 33, 36 (1994) ("Attention must be focused on objective reasonableness rather than on the police officer's subjective intent."). Although cases from other jurisdictions have inquired into whether the officer subjectively intended to search the property, we note that, in each of those cases, the officer's subjective intent only became relevant if the officer exceeded the ordinary scope of the implied consent by, for example, invading other areas of the curtilage *after* attempting a "knock and talk." *See, e.g., Estate of Smith v. Marasco*, 318 F.3d 497, 520-21 (3d Cir.2003) (remanding qualified immunity case for further factual determinations where the officers knocked on the front door, the defendant failed to answer, and the officers then entered the backyard of the residence); *Alvarez*, 147 F.3d at 357 (inquiring into officer's subjective purpose for entering the backyard where the officers, who were investigating an underage drinking party, approached the front door,

noticed a sign that said "Party in Back," and then went to the backyard to "speak with the party's host").

Here, however, Officer Cox had not yet performed a "knock and talk," nor had he invaded any areas of the curtilage other than those associated with the "path" to the front door. Indeed, when Officer Cox first viewed the illicit activity, he had not yet finished driving up the driveway. Under the circumstances of this case, then, there is no additional intrusion into the curtilage that would necessitate an inquiry into whether Officer Cox subjectively intended to conduct a general search of the property when he first entered the driveway. Accordingly, we hold that Officer Cox's subjective intent is irrelevant under the circumstances of this case. *See Edwards v. Commonwealth*, 38 Va.App. 823, 827, 568 S.E.2d 454, 456 (2002) ("The United States Supreme Court has articulated the standard for measuring the scope of an individual's consent under the Fourth Amendment to be '*objective* reasonableness . . . .' " (quoting *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 297 (1991) (internal quotation marks omitted) (emphasis added))); *see also McIntyre*, 860 P.2d at 302 (holding that "[t]he trial court's reliance on the officers' investigative purpose was misplaced" because " '[c]riminal investigation is as legitimate a societal purpose as is census taking or mail delivery' " (quoting *Corbett*, 516 P.2d at 490) (second alteration in original)); *cf. Krause v. Penny*, 837 F.2d 595, 597 (2d Cir.1988) (dismissing qualified immunity suit where "a reasonable officer . . . might [] have [objectively] believed that [the plaintiff] consented to his presence in the driveway").

Appendix B

Thus, considering the totality of the circumstances, we conclude that, on the night of the party, Robinson impliedly consented to have members of the public-including law enforcement officers-enter her driveway. We further conclude that Officer Cox did not exceed the scope of this implied consent because, by driving up the driveway and parking in the parking area, he went no further than an ordinary member of the public would have gone in an attempt to contact the occupants of the premises. Accordingly, because Robinson extended an implied invitation to enter the property, and because Officer Cox did not exceed the scope of that implied consent, the Fourth Amendment had not been implicated at the point in time when the officer observed the individuals drinking beer and then fleeing into the woods.

Because Officer Cox was legitimately present on the property when he viewed the illegal activity, and because Robinson presents no further arguments in support of her position that the trial court should have granted her motion to suppress,[10] we hold that the trial court did not err in denying the motion to suppress. Accordingly, we affirm her convictions.

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10. During oral arguments, Elisa Robinson conceded that, if Officer Cox was legitimately present on the driveway, his subsequent entry into the backyard would be permissible because the officer had both probable cause and exigent circumstances.

Appendix B

B. *George Robinson: Probable Cause and Exigent Circumstances*

Counsel for George Robinson[11] contends, however, that, once Officer Cox confirmed his suspicion that underage individuals were consuming alcoholic beverages, the officer should have immediately left or otherwise secured the premises and then obtained a search warrant. Any further intrusion into the property, Robinson reasons, including the "search and seizure subsequently conducted in the ... backyard," violated the Fourth Amendment because the officer lacked the exigent circumstances sufficient to justify the warrantless entry onto the property. For the reasons that follow, we disagree.

As Robinson argues, it is true that, "absent (1) exigent circumstances and probable cause or (2) consent, law enforcement agents cannot enter the curtilage of a person's home either to search or seize without previously obtaining a warrant." *Jefferson*, 27 Va.App. at 16, 497 S.E.2d at 481. Here, as discussed in Part III(A), *supra*, and as Robinson concedes, Officer Cox's initial intrusion into the curtilage was justified because Robinson-by extending an implied invitation to members of the public to enter his driveway-impliedly consented to that limited intrusion. The only remaining question that must be resolved, then, is whether Officer Cox, once he had observed the minors drinking beer and fleeing into the woods, could intrude further into the curtilage without violating Robinson's constitutional rights.

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11. For purposes of this subsection, George Robinson will be referred to simply as "Robinson."

Under the circumstances of this case, we conclude that the entry was justified.

Initially, we note that the facts, when viewed in the light most favorable to the Commonwealth, establish that Officer Cox did not exceed the scope of Robinson's implied consent until *after* he had observed the underage individuals drinking alcohol and then fleeing from the scene. Specifically, as discussed above, Robinson had impliedly consented for members of the public to intrude upon certain, limited areas of the curtilage, including the driveway, the sidewalk, the area of the driveway immediately adjacent to the sidewalk, and the parking area at the end of the driveway. Thus, Officer Cox, who was located "at the bush" when he "clearly" saw "two male juveniles standing on the other side of the tree holding beer bottles," had not exceeded the scope of the implied consent when he initially viewed the illegal activity. And, before Officer Cox could proceed significantly further up the driveway,[12] the individuals "looked at [Cox], ... looked ... towards the back of the house, [] yelled 'cops,' ... dropped their

12. Robinson argues that, because Cox "had continued traveling the entire time that these observations were being made," this Court must find, of necessity, that Officer Cox had "penetrated the privacy line" when the juveniles first noticed the police vehicle and then fled. The record is silent on the issue of Officer Cox's exact location when the juveniles dropped their beer bottles and ran into the woods. However, as discussed in Part III(A)(2), *supra*, Officer Cox had not yet exceeded the scope of Robinson's implied consent when he parked his police vehicle in the parking area by the garage. Thus, even if Officer Cox did not observe the fleeing juveniles until after he had pulled into the parking area, he had not yet exceeded the scope of the implied invitation.

beer bottles[,] and [then] ran down [the] fence line, towards the woods." It was only then that Officer Cox parked his car, got out of the police vehicle, and entered the backyard.

Considering these facts, the trial court found that Officer Cox's subsequent intrusion into the backyard was justified because he possessed both probable cause and exigent circumstances.[13] We agree. Clearly, once the officer observed the seemingly underage individuals holding beer bottles and then fleeing from the police presence, he had probable cause to believe that a crime was being committed. *See, e.g.*, Code § 4.1-305(A) (providing that "[n]o person" under the age of 21 "shall consume, purchase or possess, or attempt to consume, purchase or possess, any alcoholic beverage"); *see also State v. Jangala*, 154 Or.App. 176, 961 P.2d 246, 247 (1998) (holding that a law enforcement officer had probable cause to believe the crime of furnishing alcohol to a minor was taking place after the officer observed a group of

13. Specifically, the trial court found that the Commonwealth had established probable cause because: (1) "there were three calls concerning the possibility of underage drinking," (2) there were ten to twenty cars "parked in front of the home," and (3) the officer observed two individuals holding clear beer bottles who "dropped the bottles and ran after yelling 'cops.' " The trial court further held that the Commonwealth had established exigent circumstances "given the likelihood of evidence being destroyed and juveniles running away," reasoning that "there was a high likelihood that the party would disperse quickly and evidence be destroyed once the juveniles or the Robinsons knew the police were on the property," further noting that "persons not detained by Corporal Cox would be likely to destroy evidence of the party immediately."

people who appeared to be minors "holding red plastic cups that [the officer] recognized as the type commonly used to serve beer from a keg").[14] The only remaining issue, then, is whether exigent circumstances justified the warrantless entry.

As noted by the Virginia Supreme Court, factors to consider when determining whether exigent circumstances justified a warrantless entry include:

> (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present in the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit.

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14. Indeed, as already noted, Robinson conceded the issue of probable cause during oral arguments, focusing instead on whether the officer had exigent circumstances sufficient to justify his warrantless entry.

Verez v. Commonwealth, 230 Va. 405, 410-11, 337 S.E.2d 749, 753 (1985); *see also Cherry v. Commonwealth*, 44 Va.App. 347, 360, 605 S.E.2d 297, 303 (2004). Moreover, in evaluating whether exigent circumstances justified a warrantless entry, we concern ourselves with "what an objectively reasonable officer on the scene could have believed." *United States v. Leveringston*, 397 F.3d 1112, 1116 (8th Cir.), *cert. denied*, __ U.S. __, 126 S.Ct. 159, 163 L.Ed.2d 145 (2005). "If such an officer would have had sufficient grounds to believe there was an exigency, then the Fourth Amendment does not require a warrant." *Id.*

Here, there is ample evidence in the record to support the trial court's finding that exigent circumstances justified the warrantless entry. Specifically, Officer Cox could reasonably have believed that multiple, underage individuals had gathered at a party in the country and consumed significant quantities of alcohol. Many of these individuals had driven to the residence and, if left to their own devices pending issuance of a search warrant, may have attempted to drive home, placing both themselves and the general public at risk of significant harm. *See, e.g., Radloff v. City of Oelwein*, 380 F.3d 344, 348 (8th Cir.2004) (holding that "[e]xigent circumstances existed . . . because of the threat to public safety if the juveniles left the house in cars while under the influence of alcohol," further noting that "[i]t would have been unreasonable ... to require the officers to quarantine the juveniles' cars during the period of time it would have taken to obtain a warrant"), *cert. denied*, 543 U.S. 1090, 125 S.Ct. 967, 160 L.Ed.2d 900 (2005); *see also Howes v. Hitchcock*,

66 F.Supp.2d 203, 216 (D.Mass.1999) (holding that the police officers could have reasonably believed exigent circumstances existed where, *inter alia*, the officers were aware of the "risk to public safety posed by the possibility of the [intoxicated, underage] partygoers getting into their cars" and driving away).

Also, upon sighting the police vehicle, several of the partygoers fled into the woods, not only creating a risk of harm to themselves but also a risk that evidence (specifically, their identities and blood alcohol levels) would be forever lost. Moreover, Officer Cox could reasonably have believed that, had he left the premises to secure a search warrant, there was a significant likelihood that the remaining partygoers-who were, at that point, aware of the police presence-would either flee or destroy physical evidence in an attempt to "cover up" the existence of the underage drinking party. *See, e.g., Howes*, 66 F.Supp.2d at 215 (holding that "the threat of destruction of evidence was sufficient to permit the warrantless entry" where "an objectively reasonable police officer . . . could have concluded that . . . many of the besotted teenagers would have fled" once they became aware of the police presence, and "[o]thers would have attempted to destroy or at least conceal evidence of the teenagers' drinking had the officers waited patiently to obtain a warrant"); *Jangala*, 961 P.2d at 247-48 (noting that "evidence of the crime of furnishing alcohol to minors is easily destroyed," and concluding that, because the officers "were aware that the evidence that they needed to seize was easily destroyed, combined with the fact that partygoers were aware of the police presence and had either run from the scene or otherwise attempted to avoid detection, there were

exigent circumstances supporting the warrantless entry").[15] Considering the totality of the circumstances, we hold that the exigencies of this situation were sufficient to authorize Officer Cox's warrantless entry into Robinson's backyard.

Moreover, we disagree with Robinson's argument that this situation is one in which the investigating officer "manufactured the exigency." It is well settled that, where law enforcement officers "create the exigency themselves, warrantless activity is per se unreasonable and we require suppression of any evidence obtained thereby." *United States v. Webster,* 750 F.2d 307, 328 (5th Cir.1984). However, as we have noted, law enforcement officers " 'are under no duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.' " *Cherry,* 44 Va.App. at 360-61, 605 S.E.2d at 303 (quoting *United States v. Tobin,* 923 F.2d 1506, 1511 (11th Cir.1991) (internal quotations omitted)); *see also Cardwell v. Lewis,* 417 U.S. 583, 595, 94 S.Ct. 2464, 2472, 41 L.Ed.2d 325 (1974) ("[W]e know of no case or principle that suggests that the right to search on probable cause and . . . under exigent circumstances [is] foreclosed if a warrant was not obtained at the first practicable moment."). Thus, where the exigencies arise during the course of a continued investigation, those exigencies will not be deemed "manufactured" unless

15. Indeed, the record reflects that Elisa Robinson at one point "told several juveniles to swallow vinegar in order to fool the [breathalyzer]."

the officer had a meaningful opportunity to obtain a search warrant prior to the development of the exigencies upon which he relied. *See, e.g., Webster,* 750 F.2d at 327 ("Our first concern in analyzing a claim of manufactured exigency is whether agents could have obtained a search warrant prior to the development of the exigent circumstances upon which they relied."); *see also United State v. Cucci,* 892 F.Supp. 775, 788 (W.D.Va.1995) ("[A] postponement in obtaining a warrant is appropriate when the purpose for the delay is to 'ferret out any hitherto unknown individuals involved in the illicit undertakings, gather additional evidence substantiating the crimes believed to have been committed, or discover any other offenses in which the suspects are involved.' " (quoting *United States v. Hultgren,* 713 F.2d 79, 87 (5th Cir.1983))).

Despite Robinson's argument to the contrary, then, Officer Cox was "under no duty" to leave the premises "the moment" he had the "minimum evidence to establish probable cause." *Cherry,* 44 Va.App. at 360-61, 605 S.E.2d at 303. And, as discussed above, negligible time passed between the moment that Officer Cox "clearly" saw "two male juveniles standing on the other side of the tree holding beer bottles," and the moment that these individuals became aware of his presence and fled. Because the development of probable cause and the creation of the exigencies were virtually contemporaneous, Officer Cox had no meaningful opportunity in which to obtain a search warrant for the property before exigent circumstances necessitated his further intrusion onto the premises. Accordingly, we conclude that the "manufactured exigency" doctrine is inapplicable

under the circumstances of this case. *See Webster*, 750 F.2d at 328 (declining to hold "that agents manufactured exigent circumstances by placing the [property] under surveillance" while attempting to gather further information).

For these reasons, we hold that the trial court did not err in concluding that the officer had both probable cause and exigent circumstances sufficient to justify his warrantless entry into Robinson's backyard. Thus, we affirm the denial of his motion to suppress.

IV. CONCLUSION

We hold that, under the facts of this case, the Robinsons extended an implied invitation to members of the public to enter the driveway and approach the front door of the residence. Because the Robinsons impliedly consented to the initial, limited intrusion, Officer Cox's presence on the driveway did not constitute an illegal search. Moreover, once he observed the underage individuals drinking beer and fleeing into the woods, Officer Cox's further intrusion onto the property was justified because he possessed both probable cause and exigent circumstances. Because Officer Cox did not violate the Fourth Amendment, we hold that the trial court properly denied the Robinsons' motions to suppress. Accordingly, we affirm their convictions for contributing to the delinquency of a minor.

Affirmed.

BUMGARDNER, J., with whom McCLANAHAN, J., joins, concurring.

I concur in the result but do not join the opinion because it rules too broadly. The officer was lawfully on the defendants' property when he observed ongoing crimes. That knowledge permitted him to pursue and arrest the crimes being committed.

ELDER, J., concurring, in part, and dissenting, in part.

I concur in the majority's ruling, based on the Commonwealth's concession, that Officer Cox was in the curtilage of the Robinsons' home when he first viewed probable illegal activity in the form of underage drinking. However, I disagree with the majority that Officer Cox's entry onto the curtilage was reasonable under the facts of this case. I believe it is the subjective intent of *the citizen* regarding whether to waive a constitutional right that ultimately controls. The legal fiction that implied consent exists for the police to enter the curtilage of a private residence for a knock-and-talk has never been held by the United States or Virginia Supreme Court to override the pronouncement of *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), that assessing the voluntariness of consent to a search is to be judged from the subjective perspective of the particular citizen involved. Because the evidence fails to prove either (1) that anyone with a reasonable expectation of privacy in the Robinsons' curtilage in fact consented to Officer Cox's entry thereon or (2) that Officer Cox could reasonably have concluded, under the facts of

this case, that those with a reasonable expectation of privacy would have consented if asked, I would hold the evidence fails to support the trial court's conclusion that Officer Cox's presence on the Robinsons' property was reasonable and did not violate the Fourth Amendment's pronouncement against unreasonable searches. Thus, I respectfully dissent from the majority's affirmance of the Robinsons' convictions.

The majority states, "Here, ... we are not questioning whether Robinson extended her consent to *search* the property, but rather, whether, under the totality of the circumstances, she had rescinded her implied consent to *enter* that property." Settled principles establish that Officer Cox's entry onto the Robinsons' property, in and of itself, was a search within the meaning of the Fourth Amendment's reasonableness requirement, *see, e.g., United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326, 334 (1987), albeit one arguably less intrusive than an entry or actual search of the dwelling itself. The majority concludes the entry was reasonable based on the existence of what it finds was the homeowners' implied consent "to have members of the general public-including law enforcement officers-enter the driveway and front sidewalk," parts of the property they could be expected to cross if entering for purposes of a "knock and talk."

Although Fourth Amendment issues are generally judged by standards of the objective reasonableness of a police officer's beliefs or actions, not all Fourth Amendment issues are judged by such standards. *See, e.g., Kyer v. Commonwealth*, 45

Va.App. 473, 481 n. 2, 612 S.E.2d 213, 217 n. 2 (2005) (en banc) (noting community caretaker standard considers officer's subjective intent). This case presents an example of the inherent tension between the general Fourth Amendment standard for assessing the reasonableness of an officer's actions and the standard for determining whether an individual has consented to a search. The United States Supreme Court has held that the test for determining the voluntariness of a consent to search is based on the subjective intent of the individual claimed to have waived his right to be free from unreasonable searches. *See Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2047-48, 36 L.Ed.2d at 862-63; *see also United States v. Wilson*, 895 F.2d 168, 171 (4th Cir.1990) (comparing objective standard for determining whether seizure has occurred with subjective standard for determining consent to search).

Under a subjective test, the fact that the Robinsons did not take affirmative steps to exclude *all* trespassers does not establish that they subjectively intended to consent to *police* entry onto the curtilage of their property for purposes of a knock-and-talk or any other purpose. Neither the United States nor the Virginia Supreme Court has ever held, as the majority of our Court does today, that "implied consent [to entry by *the police* for a knock-and-talk] is presumed to exist absent evidence of an affirmative intent to exclude *the public* from the premises," *see* discussion, *supra*, at 658 n. 6 (citing *State v. Somfleth*, 168 Or.App. 414, 8 P.3d 221, 227 (2000)) (emphasis added), or that "[an] implied invitation [to enter for such a purpose] arises by operation of law," *see id.*

Here, the police made no claim that the Robinsons gave actual consent to have the police enter the curtilage of their home on the night at issue. Officer Cox testified that the police made no attempt to contact the Robinsons' home by telephone or any other means before driving onto the property that night. The fact that the Robinsons had not posted "no trespassing" signs and may have consented, if asked, to allow other members of society such as letter carriers and Girl Scouts onto the curtilage does not mean that they would, if asked, have granted the same privilege to the police on the night at issue. Thus, if the entry is to be judged purely from the subjective perspective of the homeowner, the absence of actual consent ends the inquiry.

At most, then, the Commonwealth might claim that, although Officer Cox lacked actual consent, his entry onto the curtilage did not violate the Fourth Amendment because a reasonable officer would have believed those having a reasonable expectation of privacy in the curtilage did consent or would have consented, if asked, to have the police enter for a knock-and-talk on the night at issue. *Cf. Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-04, 114 L.Ed.2d 297, 302 (1991) (holding "[t]he standard for measuring *the scope* of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" (emphasis added)); *Illinois v. Rodriguez*, 497 U.S. 177, 185-86, 110 S.Ct. 2793, 2799-2800, 111 L.Ed.2d 148, 159-60 (1990) (holding that general rule that officer's assessments of fact need not always be correct as long as they are

reasonable applies to officer's assessment of whether party giving consent to search has authority to do so); *United States v. Smith*, 395 F.3d 516, 519 (4th Cir.2005) ("[T]he Fourth Amendment does not even require that the suspect *actually* consent to a government search; factual determinations by the government, such as the presence of consent, must be *reasonable*, but are not required always to be correct."). I believe the objective reasonableness of an officer's assessment of whether a homeowner has consented should not be relevant when the issue deals with protecting one's Fourth Amendment rights in his home and its curtilage. *See, e.g.*, Ronald Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 Wm. & Mary Bill of Rts. J. 677, 729 (1998). As one commentator has opined,

> The fundamental right of individuals to control their own fate by exercising or waiving constitutional rights must take precedence over a police officer's mistaken perception of consent, no matter how objectively reasonable or understandable the mistake may have been. From the police perspective, the only sensible guide is that "they should never rely on consent as the basis for a search unless they must. If they do search relying on consent, they should be prepared to meet a heavy burden of proof that consent was in fact meaningfully given. And even then, because of the difficulties of proof, they should expect to be told often that the search was not proper."

Id. (quoting Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L.Rev. 47, 64 (1976)).

Nevertheless, even if we examine whether Officer Cox could reasonably, albeit erroneously, have believed those having a reasonable expectation of privacy in the curtilage would have consented to his entry, if asked, we must conclude the entry violated the Fourth Amendment. The evidence fails as a matter of law to support a finding that Officer Cox could reasonably have believed *these particular citizens* would have consented to his entry on the night at issue. Under the facts of this case, both the adult homeowners and any juveniles who resided with them had a reasonable expectation of privacy in the home and the portions of the curtilage not viewable from the public road. *See, e.g., State v. Reddick*, 207 Conn. 323, 541 A.2d 1209, 1213-14 (1988) (holding adult child legitimately residing in home of parent has reasonable expectation that home will be free of government intrusion); *see also Grant v. State*, 267 Ark. 50, 589 S.W.2d 11, 14 (1979) (recognizing implicitly that, absent parental consent for search, child has reasonable expectation of privacy in premises in which he resides with parent). Officer Cox went to the property that night because the police had received multiple reports that an underage drinking party was underway at the Robinsons' home. Under these circumstances, Officer Cox could not reasonably have concluded that either (a) the Robinsons, if they were at home, or (b) "the juvenile host" of the party, if the Robinsons were not present,[16] would have

16. Officer Cox testified that he was searching for the party's juvenile host and appeared to have believed, at least

(Cont'd)

consented to entry of the police on the curtilage, where they could readily discover evidence of criminal activity not visible from the public road.[17]

For these reasons, I would hold the evidence fails to support the majority's conclusion that implied consent justified the entry of the Robinsons' curtilage. Further, absent evidence (1) that anyone with a reasonable expectation of privacy in the Robinsons' curtilage in fact consented to Officer Cox's entry thereon or (2) that Officer Cox could reasonably have concluded, under the facts of this case, that those with a reasonable expectation of privacy would have consented if asked, I would hold that Officer Cox's presence on the Robinsons' property was unreasonable and violated the Fourth Amendment's pronouncement against unreasonable searches. Thus,

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(Cont'd)
after he confirmed that underage drinking was occurring, that he would not find any adults present.

17. Although a reasonable person test presupposes an innocent person, *see, e.g., Florida v. Bostick*, 501 U.S. 429, 438, 111 S.Ct. 2382, 2388, 115 L.Ed.2d 389 (1991) (applying principle in evaluating objective test for determining whether suspect was illegally seized), a subjective test, such as the test for consent to search, must take into consideration an individual's guilty knowledge. Although guilty persons may be found to have given valid consent to search, even though such consent is against their self-interest, *see United States v. Mendenhall*, 446 U.S. 544, 555, 559, 100 S.Ct. 1870, 1878, 1880, 64 L.Ed.2d 497, 510, 513 (1980), it is not objectively reasonable for an officer to assume, without asking, that a person he suspects is guilty of engaging in some criminal activity on his property would consent to law enforcement entry onto the curtilage if asked.

Appendix B

I respectfully dissent from the majority's affirmance of the Robinsons' convictions.

BENTON, J., dissenting.

"[A] search or seizure carried out on ... [residential] premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.' " *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75, 91 S.Ct. 2022, 2043, 29 L.Ed.2d 564 (1971). *See also Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 515, 19 L.Ed.2d 576 (1967). This principle applies to entries and searches within "the curtilage . . . [, which] has been considered part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984). Thus, the Robinsons' driveway, a part of their home's curtilage, was a place where they could "legitimately demand privacy" from illegitimate police intrusion. *Id.* at 178, 104 S.Ct. at 1748. The Commonwealth failed to prove that police officers' warrantless entry and search onto the curtilage of the Robinsons' residence falls within the "jealously and carefully drawn" exceptions to the Fourth Amendment's warrant requirement. *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958).

No evidence in this record establishes that the police officers went to the Robinsons' residence to "knock and talk." The evidence proved that Sergeant Allen of the Albemarle Police Department "was ... placed in charge of a potential investigation of an

underage drinking party." At his direction, Officer Scott Cox, a corporal, went to the property at 11:00 p.m. to "investigate" the party without any plan to first go to the front door to make inquiries. Indeed, the trial judge found that Officer Cox "planned to enter the property to investigate the allegations of underage consumption of alcohol."

Officer Cox testified about the plan the officers prepared before going to the residence. In response to the prosecutor's questions, Officer Cox explained the plan:

> Q: And what was the plan? You were going to go onto the property, and then what was going to happen?
>
> A: I was just going to take the investigation further.

He further testified that "Sergeant Allen suggested that [Officer Cox] go first to investigate" while other police officers remained in their vehicles a half mile away, waiting for information from him. Officer Cox did not testify that the plan included an inquiry at the front door of the residence. Indeed, the facts patently establish that was not part of the plan. When Officer Cox drove toward the residence and was still on the public highway, he saw cars in the driveway, "got on the radio and . . . said [to the other waiting officers], 'Please start heading this way. It appears there's a party.' " At that point, he had seen no juveniles drinking

alcohol. Nor had he seen any people at the residence.

Officer Cox then drove up the driveway "to investigate further," explaining his plan as follows:

Q: Isn't it correct that you have described the situation you were hoping to observe as the effect when you flick on a light in a dark kitchen, and the cockroaches scatter?

A: Right.

Q: So you were looking for a reaction of people scattering to confirm your suspicion that you had an underage drinking party.

A: Right.

* * * * * *

Q: Officer Cox, isn't it true that it was not your intent to walk to the front door and knock on it, as you proceeded up that driveway that night?

A: My intent when I drove up the driveway was to establish probable cause, to investigate the scene further.

When Officer Cox saw "two people that *appeared* to be juveniles" holding beer bottles in the backyard, he continued to drive past the walkway that led to the front door and stopped his vehicle "as far back on

the asphalt as [he] possibly could." Officer Cox stopped at a place from which he could see into the backyard. He testified he "wanted to identify [the two people], to find out what their age was, and to see if it was alcohol." Officer Cox testified that when the two people dropped the bottles and scattered, his suspicion about who they were and what they were holding caused him to believe it was probable that they were underage and drinking alcohol. When he exited his vehicle, he "got on the radio, and ... told everybody ... that the kids were running east ... into the woods." He then went into the backyard as the "backup [officers] were coming to assist" because he "was looking for the juvenile hosting the party."

The sergeant's plan of action and Officer Cox's conduct on the driveway all establish that they were not there to "knock and talk" and that they went beyond any implied invitation to be on the property. "[N]o . . . right exists" for a police officer to enter upon the curtilage of a person's home to conduct an investigation merely because the officer had a reasonable suspicion of criminal activity. *Rogers v. Pendleton*, 249 F.3d 279, 289 (4th Cir.2001). Although the police officer may walk to the front door of a residence to knock and speak to a resident, limitations exist upon the officer's conduct. *Id.*[18]

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18. Obviously, the occupants of a residence have not issued an implied invitation to the public to enter the premises to search or rummage around or to engage in illegitimate conduct.

A government agent, in the same manner as a private person, may accept an invitation to do business and may

(Cont'd)

> [T]he right to "knock and talk," that is, to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants, [is] not the right to make a general investigation in the curtilage based on reasonable suspicion. A contrary rule would eviscerate the principle . . . that the curtilage is entitled to the same level of Fourth Amendment protection as the home itself.

Id.

Simply put, the government failed to meet its "heavy burden" to show this was one of the few and carefully delineated exceptions to the warrant requirement. *Welsh v. Wisconsin*, 466 U.S. 740, 749,

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(Cont'd)

enter upon the premises *for the very purposes contemplated by the occupant*. Of course, this does not mean that, whenever entry is obtained by invitation . . . an agent is authorized to conduct a general search for incriminating materials.

Lewis v. United States, 385 U.S. 206, 211, 87 S.Ct. 424, 428, 17 L.Ed.2d 312 (1966). Thus, when, as here, an officer enters the curtilage "to establish probable cause to investigate the scene further," his intrusion does not fall within the property owner's implied invitation to the public. *See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979) (holding that "there is no basis for the notion that because a [property owner] invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees").

104 S.Ct. 2091, 2097, 80 L.Ed.2d 732 (1984). Officer Cox was not sent to make an inquiry at the front door, and he never approached the front door. Acting on a reasonable suspicion, he drove onto the curtilage "to investigate the scene further.' The plan the sergeant devised involved Officer Cox entering the curtilage "to establish probable cause" to charge the occupants with a crime. Officer Cox's conduct was consistent with that plan.

> The distinction between approaching a house to knock on the front door, as citizens do every day, and persisting ... in a comprehensive search for ... underage drinkers ... would seem obvious.... [G]eneral searches of the curtilage of a private home may [not] be conducted without a warrant or exigent circumstances, based simply upon reasonable suspicion.

Rogers, 249 F.3d at 289.

For these reasons, and for the reasons more fully discussed in Judge Elder's dissent to the majority opinion and Judge Annunziata's dissent to the panel's opinion, *see Robinson v. Commonwealth*, 45 Va.App. 592, 622-32, 612 S.E.2d 751, 765-71 (2005), I would hold that the police officers' entry and search was violative of the Fourth Amendment.

APPENDIX C — OPINION OF THE COURT OF APPEALS OF VIRGINIA, ALEXANDRIA DATED MAY 17, 2005

Court of Appeals of Virginia, Alexandria.

Record Nos. 2474-03-2, 2539-03-2.

ELISA KENTY ROBINSON

v.

COMMONWEALTH OF VIRGINIA.

GEORGE FISHER ROBINSON

v.

COMMONWEALTH OF VIRGINIA.

May 17, 2005.

Present: HUMPHREYS, FELTON, JJ, and ANNUNZIATA, S.J.*.

HUMPHREYS, Judge.

George F. Robinson and Elisa K. Robinson (collectively, "the Robinsons") appeal their convictions for contributing to the delinquency of a minor, a violation of Code § 18.2-371. The Robinsons argue on appeal that the trial court erred in denying

* Judge Annunziata participated in the hearing and decision of this case prior to the effective date of her retirement on December 31, 2004 and thereafter by her designation as a senior judge pursuant to Code § 17.1-401.

their motions to suppress, contending that, because the investigating police officer was located in the curtilage of their home when he witnessed the illicit activity, the resulting search violated their Fourth Amendment right to be free from unreasonable searches and seizures. For the following reasons, we disagree and affirm their convictions.

I. BACKGROUND

In accord with our usual standard of review, on the appeal of a denial of a motion to suppress, we view the evidence and all reasonable inferences flowing from the evidence in a light most favorable to the Commonwealth, the party prevailing below. *Garcia v. Commonwealth*, 40 Va.App. 184, 189, 578 S.E.2d 97, 99 (2003); *Sabo v. Commonwealth*, 38 Va.App. 63, 69, 561 S.E.2d 761, 764 (2002).

On August 16, 2002, the Albemarle County Police Department received three separate telephone calls reporting an alleged underage drinking party at the Robinsons' home. Corporal Scott Cox was dispatched to investigate these allegations, and he arrived at the Robinsons' home at approximately 11:00 p.m. From the state road in front of the house, Cox could see ten to twenty cars parked on the state road, as well as two to three parked cars on the left-hand side of the driveway. From that position, Cox could also see the house, the front porch, the front door, and the front yard, although he could not see the backyard or the entire driveway. The floodlights above the front door were turned on, and the lights along the sidewalk leading to the front door were also turned on.

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Cox, who was driving a marked police car with its headlights on, turned into the driveway and started to drive towards the house. While proceeding up the driveway, Cox saw several additional parked vehicles near the right side of the driveway, as well as "several parked vehicles near the side of the house" straight in front of him.

Cox continued up the driveway in his police car. From his position inside the police car, he began to see some "activity" in the backyard. Before reaching the point where the walkway to the front door intersects with the Robinsons' driveway, Cox saw two individuals holding clear beer bottles. The individuals, both of whom appeared to be underage, were standing by a pine tree about seven or eight yards away from Cox's police car. The two juveniles "looked at [Cox], looked at the house, yelled 'cops,' dropped the beer bottles, and ran down a fence line toward the woods." Cox pulled his police car behind one of the parked cars and looked to his left. From that vantage point, "[h]e saw juveniles running toward the woods." Also, "[h]e could see a patio table covered with beer bottles and noticed beer bottles strewn about the backyard." Cox then got out of his car, "yelled for people to stop running, and radioed other officers who were waiting off the property that kids were running east into the woods."

The Robinsons were arrested and charged with nineteen counts of contributing to the delinquency of a minor. Both parties filed a motion to suppress, contending that Cox was unlawfully present on their property when he viewed the illicit activity.

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At the suppression hearing, several photographs were introduced depicting the layout of the Robinsons' premises. According to the photographs, the driveway originates from the state road in front of the house. The driveway then splits into two paths. Both paths continue towards the house, and they both bend towards the right. The two branches of the driveway merge back into a single driveway near the front, right-hand corner of the house. The house is positioned entirely to the left of the driveway.

Also, a lighted sidewalk leads from the driveway to the front door of the Robinsons' home. This sidewalk intersects with the driveway just past the area where the two branches of the driveway reunite. A large bush has been planted in front of the sidewalk at the point where the sidewalk intersects with the driveway, shielding a portion of the sidewalk from view. Other than walking across the grass in the front yard, the driveway and connecting sidewalk serve as the only means of apparent pedestrian access to the front door of the house.

Where the driveway paths are divergent, the area between the two branches forms an "island" containing numerous trees. These trees, along with the general rightward bend of the driveway, shield the garage, backyard, and a large portion of the driveway from public view. The portion of the driveway shielded from public view includes the bush and the area where the front sidewalk intersects with the driveway.

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At the suppression hearing, Cox testified that his police car was next to the bush in the driveway when he "clearly" saw "two male juveniles standing on the other side of the tree holding beer bottles." To clarify the position in the driveway from which the officer observed the juveniles, the trial court asked Cox, "So you were at the bush when you saw the two individuals?" Cox responded, "That's right."

Cox was asked repeatedly on cross-examination whether he entered the driveway for the purpose of knocking on the front door to speak with an occupant of the house. Each time Cox was asked the question, he responded that he entered the property to "investigate." Cox further responded in the affirmative to the following question: "Isn't it correct that you have described the situation you were hoping to observe as the effect when you flick on a light in a dark kitchen, and the cockroaches scatter?" Cox was also asked, "So you were looking for a reaction of people scattering to confirm your suspicion that you had an underage drinking party?" Cox responded, "Right."

By letter opinion dated August 4, 2003, the trial court denied the Robinsons' motions to suppress. In its written opinion, the trial court observed that Cox "planned to enter the property to investigate the allegations of underage consumption of alcohol." The trial court also observed that, "[a]s Cox went down the driveway, he could not see the backyard or the garage," but that "[h]e could see the house, the front yard, and the front porch." Additionally, the trial court found that "[t]here were no signs posted"-such as a "no trespassing" sign-at the entrance to the driveway.

Based on this evidence, the trial court found that the Robinsons' driveway was not part of the curtilage of the house and, therefore, concluded that "Cox's presence there [did] not implicate the Fourth Amendment." The court additionally found that Cox's presence in the Robinsons' driveway was justified by the officer's right to conduct a "knock and talk," that is, to approach a home and knock on the front door to speak with an occupant. Under either of the preceding rationales, the trial court concluded that "Cox was in a lawful place in the driveway" when he observed the two juveniles drinking beer, and his observations were therefore admissible pursuant to the plain view exception to the warrant requirement. Accordingly, the trial court denied the Robinsons' motions to suppress.

The Robinsons were subsequently convicted of nine counts of contributing to the delinquency of a minor, and the trial court sentenced each defendant to six months in jail, three months suspended, on each count. The trial court ordered the sentences to run consecutively, resulting in active jail time of twenty-seven months for each defendant. The Robinsons appeal.

II. ANALYSIS

Although " '[w]e are bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them,' . . . we review de novo the trial court's application of legal standards . . . to the particular facts of the case." *McCracken v. Commonwealth*, 39 Va.App. 254, 258, 572 S.E.2d 493, 495 (2002) (en banc) (quoting *McGee v.*

Commonwealth, 25 Va.App. 193, 198, 487 S.E.2d 259, 261 (1997) (en banc)) (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996)). Further, "[i]n reviewing a trial court's denial of a motion to suppress, 'the burden is upon [the appellant] to show that the ruling ... constituted reversible error.' " *McGee*, 25 Va.App. at 197, 487 S.E.2d at 261 (quoting *Fore v. Commonwealth*, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980)).

Whether a defendant has a reasonable expectation of privacy in the item seized or the place searched is a mixed question of law and fact. That is, we are bound by the trial court's underlying findings of fact, but we review *de novo* the ultimate determination of whether the Fourth Amendment applies under the circumstances of this case. *See Sharpe v. Commonwealth*, 44 Va.App. 448, 454, 605 S.E.2d 346, 349 (2004) ("[W]e review *de novo* the trial court's application of defined legal standards such as whether a defendant had a reasonable expectation of privacy sufficient to permit him to raise a Fourth Amendment challenge to a search.").

A. *Cox Was On the Curtilage When He Observed the Juveniles Drinking Beer*

The Robinsons contend that Cox conducted an unconstitutional search because the place from which Cox observed the juveniles drinking beer was a part of the curtilage of their home. Although we agree that Cox observed the juveniles drinking beer from within the curtilage of the Robinsons' home and the trial court erred in concluding otherwise, that determination will not end our inquiry. *See* Part II.B, *infra*.

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Because homeowners possess a reasonable expectation of privacy in the curtilage surrounding their homes, *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 1742, 80 L.Ed.2d 214 (1984), "the curtilage ... warrants the *605 Fourth Amendment protections that attach to the home." *Id.; see also Jefferson v. Commonwealth*, 27 Va.App. 1, 15, 497 S.E.2d 474, 481 (1998) ("Consistent with the common law understanding of the extent of the 'home,' the Supreme Court has held that the Fourth Amendment protections that apply to the house also apply to the 'curtilage' of the house."). Because the Fourth Amendment protects the curtilage to the same extent as the home, a police officer may not enter the curtilage without a warrant, exigent circumstances, or pursuant to an express or implied invitation from the occupant. *See Payton v. New York*, 445 U.S. 573, 589-90, 100 S.Ct. 1371, 1381-82, 63 L.Ed.2d 639 (1980) ("To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances. ..." (internal quotations omitted)).

Generally, the curtilage of a home is the "area around the home to which the activity of home life extends." *Oliver*, 466 U.S. at 180, 104 S.Ct. at 1742; *see also Wellford v. Commonwealth*, 227 Va. 297, 301, 315 S.E.2d 235, 238 (1984) (defining "curtilage" as the "space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwelling").

"[W]hether a particular place is within the curtilage of the home is determined on a case-by-case basis." *Jefferson*, 27 Va.App. at 16, 497 S.E.2d at 481 (citing *United States v. Dunn*, 480 U.S. 294, 301 n. 4, 107 S.Ct. 1134, 1140 n. 4, 94 L.Ed.2d 326 (1987)). In determining whether the area in question constitutes curtilage, "particular reference" to the following four factors is helpful:

> the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.

Dunn, 480 U.S. at 301, 107 S.Ct. at 1140; *Jefferson*, 27 Va.App. at 16, 497 S.E.2d at 481. "[T]hese factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration-whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn*, 480 U.S. at 301, 107 S.Ct. at 1140.

Applying the *Dunn* factors to this case, we conclude that the portion of the driveway from which Cox observed the juveniles drinking beer-the area next to the bush-falls within the curtilage of the Robinsons' home. First, the area next to the bush is within a few feet of the home itself. Second, the Robinsons testified that they used the area for washing cars and unloading groceries, home-related

activities that evidence the "nature of the uses to which the area is put." *See id.* Third, although the area next to the bush is not "included within an enclosure surrounding the home," *see id.*, the area is protected from public observation. Specifically, although the Robinsons did not erect a fence or post any no-trespassing signs, the trees and layout of the driveway obscure the area from public view. It is evident, therefore, that the area next to the bush is "protect[ed] . . . from observation by people passing by." *Id.* Given that three out of the four *Dunn* factors are satisfied, we are compelled to conclude that the area next to the bush is "intimately tied to the home itself" and, thus, falls within the curtilage of the Robinsons' home. *See Jefferson*, 27 Va.App. at 17, 497 S.E.2d at 482 (finding that place of defendant's arrest constituted curtilage because "the proximity of the place where Officer Harpster arrested appellant *was extremely close* to appellant's house and *could not be viewed by pedestrians and drivers passing in front of the house*" (emphasis added)); *see also United States v. Jenkins*, 124 F.3d 768, 773 (6th Cir.1997) (finding that defendant's backyard is curtilage because it was "well shielded from the view of people passing by on the only public thoroughfare near defendant's property").

Accordingly, we conclude that the trial court erred in holding that the area of the driveway next to the bush was not a part of the curtilage of the house. However, in light of our holding that the Robinsons did not have a reasonable expectation of privacy in their driveway, *see* Part II.B, *infra*, this error is harmless. *See Lavinder v. Commonwealth*, 12 Va.App.

1003, 1005, 407 S.E.2d 910, 912 (1991) (*en banc*) (noting that an error is harmless "if a reviewing court can conclude, without usurping the . . . fact finding function, that, had the error not occurred, the [result] would have been the same").

B. *Whether the Robinsons Had A Reasonable Expectation of Privacy in the Area of the Driveway by the Front Sidewalk*

Although Cox was positioned within the curtilage when he made his observations, that determination does not end our inquiry. It is well established that " '[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection,' " *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 1813, 90 L.Ed.2d 210 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)), because there is no reasonable expectation of privacy in items or places that are open to public observation. *See California v. Greenwood*, 486 U.S. 35, 41, 108 S.Ct. 1625, 1629, 100 L.Ed.2d 30 (1988). The question we must answer, therefore, is whether the Robinsons knowingly exposed to the public the area of their driveway next to the bush, the place from which Cox viewed the criminal activity.[1]

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1. We agree with the Commonwealth that observation of the curtilage is not prohibited when the police conduct observations from a public vantage point. *See generally Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) (approving observation of the curtilage from a helicopter); *Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (approving observation of the curtilage from an airplane);

(Cont'd)

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The Commonwealth argues that the Robinsons knowingly exposed to the public the area by the front sidewalk because: (1) the Robinsons' driveway is viewable from the state road, and (2) visitors exercising an implied invitation to the Robinsons' home would use that area to access the house and front door. Although we disagree with the former contention, we conclude that, under the circumstances of this case, the Robinsons impliedly invited members of the public onto their driveway on the night in question. Accordingly, because the Robinsons relinquished any reasonable expectation of privacy in this portion of their driveway, the Fourth Amendment does not apply to that area of the curtilage, and we therefore affirm the trial court's denial of the motions to suppress.

1. *Whether the Driveway is Visible From the Public Road*

The Commonwealth argues that the Robinsons have no reasonable expectation of privacy in their driveway because a segment of the driveway is visible from the state road. We disagree with this contention. We note that each of the cases relied upon by the Commonwealth is distinguishable because, in those cases, the driveway was viewable in its *entirety* from a public thoroughfare. *See Shaver v. Commonwealth*,

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(Cont'd)

Jenkins, 124 F.3d 768 (approving observation of the curtilage from a helicopter). Here, however, the police did not observe the curtilage from a public vantage point, such as public airspace or a public roadway; rather, the police entered the curtilage and from that private vantage point observed criminal activity.

30 Va.App. 789, 793, 797, 520 S.E.2d 393, 395, 397 (1999) (upholding the police search of an ATV parked in defendant's driveway because the ATV was "visible from the road" and because "defendants made no attempt to restrict or shield the driveway from public view"); *see also United States v. Roccio*, 981 F.2d 587, 591 (1st Cir.1992) (finding no reasonable expectation of privacy in car and driveway where the car "was clearly visible from the street on an unobstructed driveway"); *Maisano v. Welcher*, 940 F.2d 499, 503 (9th Cir.1991) (" 'The expectation of privacy which a possessor of land may reasonably have while carrying on activities on his driveway will generally depend upon the nature of the activities and *the degree of visibility from the street.*' " (emphasis added) (quoting *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir.1975))); *United States v. Smith*, 783 F.2d 648, 650 (6th Cir.1986) (finding no reasonable expectation of privacy in defendant's driveway where "there were no obstructions between the [public] road and the house"); *United States v. Humphries*, 636 F.2d 1172, 1179 (9th Cir.1980) (finding police entry into driveway to view a vehicle license plate violated no reasonable expectation of privacy where "the auto was visible from the street" and where "the driveway was [not] enclosed by a fence, shrubbery or other barrier"); *cf. State v. Kelly*, 119 S.W.3d 587, 593-94 (Mo.Ct.App.2003) (finding no reasonable expectation of privacy in the area around stairs leading to a front porch because "the area was not enclosed or protected from observation by passersby in any way and was entirely visible from the public street").

Here, only a portion of the driveway was viewable from the state road, and the area in the driveway from which Cox conducted his observations was shielded from public view by the trees and the bend of the driveway. Indeed, the trial court specifically found that Cox could not see the backyard or the garage due to the trees located between the branches of the driveway, and it is evident that he could not see the two juveniles drinking beer until he reached the area next to the bush, which, as discussed above, was not viewable from the state road. Because the area from which Cox observed the criminal activity was not viewable to members of the public traveling on the state road, the Robinsons legitimately retained a reasonable expectation of privacy in that area of the driveway unless they extended to the public an express or implied invitation to enter the property. *See State v. Carter*, 54 Or.App. 852, 636 P.2d 460, 462 (1981) (finding that defendant had reasonable expectation of privacy in a portion of his property beyond an inner gate because that area was not viewable from beyond an outer metal gate).

2. *Implied Invitation*

The Commonwealth also argues that the Robinsons had no reasonable expectation of privacy in the area by the front sidewalk because, on the night of the party, the Robinsons extended an implied invitation to anyone, including a police officer, to approach the front door and knock. The Commonwealth's argument is that, in approaching the front door, a visitor would necessarily have to enter and walk up the driveway and then cross the area next to the bush in order to access the walkway

to the front door. Because the Robinsons should expect visitors, including a police officer, to enter the same area that Cox entered, the Commonwealth reasons that the Robinsons knowingly exposed that area to the public. The Commonwealth concludes that the Robinsons therefore cannot have a reasonable expectation of privacy in that particular area and, as a result, Cox's presence in that area did not offend the Fourth Amendment.

Considering the totality of the circumstances of this case, we agree with the Commonwealth and conclude that the Robinsons extended an implied invitation to the public-including law enforcement officers-to use their driveway and front sidewalk when attempting to contact the owners or occupants of the property. We also conclude that, taking, as we must, the historical facts in the light most favorable to the Commonwealth, Cox's conduct did not fall outside the scope of this implied invitation.

a. *Whether the Robinsons Extended an Implied Invitation to Enter the Premises*

It is generally recognized that, unless they affirmatively warn or discourage trespassers, owners or possessors of private property implicitly invite the public to intrude upon certain, limited areas of their property. As we have noted,

> "People commonly have different expectations, whether considered or not, for the access areas of their premises than they do for more secluded areas. Thus, we do not place things of a private nature on our

> front porches that we may very well entrust to the seclusion of a backyard, patio or deck. In the course of urban life, we have come to expect various members of the public to enter upon such a driveway, e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends. Any one of them may be reasonably expected to report observations of criminal activity to the police."

Shaver, 30 Va.App. at 796, 520 S.E.2d at 397 (quoting *State v. Corbett*, 15 Or.App. 470, 516 P.2d 487, 490 (1973)).

This invitation, where it exists, extends only to those areas of the property that would be used when approaching the residence in an ordinary attempt to speak with the occupants. *See id.* Thus, areas of the curtilage that must be crossed in order to approach the front door-for example, the driveway, front sidewalk, and front porch-are generally exempted from Fourth Amendment protection. *See, e.g., State v. Clark*, 124 Idaho 308, 859 P.2d 344, 349 (Ct.App.1993) ("There is an implied invitation for the public to use access routes to the house, such as parking areas, driveways, sidewalks, or pathways to the entry, and there can be no reasonable expectation of privacy as to observations which can be made from such areas."). As a result, if the property owner has implicitly invited the public to use a particular "path" when attempting to access his home, he has no reasonable expectation of privacy in that area. *See id.*

By extension, the same implied invitation is given to police officers who enter the curtilage while in pursuit of legitimate police business. *See Shaver*, 30 Va.App. at 796, 520 S.E.2d at 397 (" 'If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so.' " (quoting *Corbett*, 516 P.2d at 490)); *see also State v. Cada*, 129 Idaho 224, 923 P.2d 469, 477 (Ct.App.1996) ("[T]he direct access routes to the house, including parking areas, driveways and pathways to the entry, are areas to which the public is impliedly invited, and [ ] police officers restricting their activity to such areas are permitted the same intrusion and the same level of observation as would be expected from a 'reasonably respectful citizen.' ").[2] Accordingly, "[w]hen police enter onto private property in order to conduct an investigation or for another legitimate purpose and restrict their entry to places that other visitors would be expected to go, such as walkways, driveways, or porches, any observation made from these areas is permissible under the Fourth Amendment." *Trimble v. State*, 816 N.E.2d 83, 88 (Ind.Ct.App.2004); *see also State v. Maxfield*, 125 Wash.2d 378, 886 P.2d 123, 134 (1994) ("If a law enforcement officer or agent does not go beyond the area of the residence that is impliedly open to the public, such as the driveway, the walkway, or an access route leading to the residence, no privacy interest is invaded.").

An implied invitation is generally presumed to exist absent evidence of an affirmative intent to

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2. *See generally* 1 Wayne R. LaFave, *Search and Seizure* § 2.3(f), at 600-03 (4th ed.2004).

exclude the public from the premises. *See, e.g., People v. Kozlowski*, 69 N.Y.2d 761, 513 N.Y.S.2d 101, 505 N.E.2d 611, 612 (1987) ("Absent evidence of intent to exclude the public, the entryway to a person's house offers implied permission to approach and knock on the front door."); *State v. Somfleth*, 168 Or.App. 414, 8 P.3d 221, 227 (2000) ("A homeowner can abrogate the presumption of implied consent to approach the front door by undertaking sufficient steps to exclude casual visitors from the front yard."). Here, then, we must consider whether, under the totality of the circumstances, the Robinsons affirmatively intended to exclude members of the public from their premises. *See generally State v. Wyatt*, 131 Idaho 562, 961 P.2d 653, 656 (Ct.App.1998) ("The determination whether a particular citizen had a legitimate expectation of privacy depends upon the unique facts of each case. We therefore examine the citizen's efforts to protect his own privacy from observation by the general public, taking into account norms of social conduct and the nature of the premises.").

Factors that may be particularly relevant to this determination include, *inter alia:* (1) whether the homeowner has erected any physical barriers, such as gates or fences, across the entrance to the property, and (2) whether the homeowner has posted signs, such as "no trespassing" or "private property" signs, indicating a desire to exclude the public from the premises. *See, e.g., State v. Christensen*, 131 Idaho 143, 953 P.2d 583 (1998) (no implied invitation to enter where the entrance to the driveway was obstructed by a closed gate posted with a "no trespassing" sign); *State v. Pacheco*, 101 S.W.3d 913, 919 (Mo.Ct.App.2003); *State v. McIntyre*, 123 Or.App.

436, 860 P.2d 299, 301 (1993) ("[C]ourts must consider all surrounding circumstances, including the existence of a fence, to determine the residents' intent."); *State v. Ridgway*, 57 Wash.App. 915, 790 P.2d 1263, 1265 (1990) (holding that marijuana recovered from doorstep should have been suppressed because police observed the marijuana after walking around a closed gate and evading guard dogs while approaching house).

Here, the Robinsons did not erect any physical barriers barring entry onto their property. There were no gates, fences, wires, or highway cones indicating that members of the public were not welcome to use the Robinsons' driveway and front sidewalk in an effort to speak with the occupants of the premises. Nor did they post any signs indicating that the general public was not welcome to enter upon their property to approach their front door. Considering the totality of the circumstances, we conclude that the Robinsons extended to the public an implied invitation to enter the driveway and front sidewalk of their premises.

b. *Whether Cox Exceeded the Scope of the Implied Invitation*

Although we hold that the Robinsons extended an implied invitation to the public to enter their property and approach the front door, we must also consider whether Cox's conduct on the night of the party exceeded the scope of that implied invitation. Ultimately, whether the officer exceeded the scope of the implied invitation "cannot be determined by a fixed formula," but must instead "be based on the facts and circumstances of each case." *People v.*

Thompson, 221 Cal.App.3d 923, 270 Cal.Rptr. 863, 874 (1990).[3]

"[U]nder normal circumstances, uninvited visitors coming to a residence to speak with an owner or resident are expected to come to the residence's most direct, obvious, and prominent entryway, which in most cases is the front door." *Trimble*, 816 N.E.2d at 88. These visitors "are also expected to leave by the same route after knocking on the front door and receiving no response," unless the "nature of the circumstances surrounding the visit" indicates that the visitor "could reasonably be expected to seek out residents through areas other than the front door." *Id.* Generally, "a substantial and unreasonable departure from the normal access route will exceed the scope of the implied invitation and intrude upon a constitutionally protected privacy interest." *Clark*, 859 P.2d at 350.

Also, an implied invitation to approach the front door of a private residence is limited in scope to those persons who are on the property for a "legitimate social or business purpose." *State v. Cloutier*, 544 A.2d 1277, 1280 (Me.1988). In the context of law enforcement officers, officers who are located on the curtilage for the purpose of approaching the front door and questioning the residents of the house are

3. Relevant factors that have been identified include "whether the officer (1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct route to the house; (5) attempted to talk with the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally." *State v. Ross*, 91 Wash.App. 814, 959 P.2d 1188, 1190 (Ct.App.1998).

deemed to be pursuing a "legitimate purpose." *See, e.g., Shaver*, 30 Va.App. at 793, 794, 520 S.E.2d at 395, 396 (noting that "investigators intended to speak with the defendants" and that the investigators first "knocked on the front door of the residence but no one answered").[4]

Although the implied invitation does permit officers to seek out the occupants of a residence in order to "investigate," the scope of this invitation does not encompass the right to conduct a general search of the premises. *See, e.g., United States v. Bradshaw*, 490 F.2d 1097, 1100 (4th Cir.1974) (noting that the officer must have a legitimate purpose other than conducting "a search of such premises directed against the accused"); *see also Rogers v. Pendleton*, 249 F.3d 279, 288 (4th Cir.2001); *Alvarez v. Montgomery County*, 147 F.3d 354, 358 (4th Cir.1998). As noted by the Fourth Circuit,

> the right to "knock and talk," that is, to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants, [is] not the right to make a general investigation in the curtilage

4. *See also United States v. Hammett*, 236 F.3d 1054, 1059 (9th Cir.2001) ("Law enforcement officers may encroach upon the curtilage of a home for the purpose of asking questions of the occupants."); *United States v. James*, 40 F.3d 850, 862 (7th Cir.1994) (finding that police did not violate the Fourth Amendment where they used a walkway, which was part of the curtilage of the home, "[i]n their attempt to reach the lower floor residents"); *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir.1990) (noting that a "policeman may lawfully go to a person's home to interview him").

> based on reasonable suspicion. A contrary rule would eviscerate the principle of *Oliver* and *Dunn* that the curtilage is entitled to the same level of Fourth Amendment protection as the home itself.

Rogers, 249 F.3d at 289. A police officer exceeds the legitimate scope of an implied invitation if he seeks to "convert[ ] this limited license to do what any citizen may do-approach the house and speak to the inhabitant or owner-into a license to search for 'evidence.' " *Id.* at 294. Thus, if a law enforcement officer, in an attempt to uncover illicit activity, strays from the "path" that is impliedly open to the public, he has exceeded the scope of the implied invitation and, as a result, violated the Fourth Amendment.

Similarly, entering the property late at night, especially if accompanied by the use of subterfuge, may exceed the scope of the implied invitation. As noted by one court,

> Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm. As compared to open daytime approaches, surreptitious searches under the cover of darkness create a greater risk of armed response-with potentially tragic results-from fearful residents who may mistake the police officers for criminal intruders.

Cada, 923 P.2d at 478; *see also Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582, 587 (2002) (" '[T]here is no

rule of private or public conduct which makes it illegal *per se*, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at *high noon*, to walk up the steps and knock on the front door of any man's castle with the honest intent of asking questions of the occupant thereof whether the questioner be a pollster, a salesman, or an officer of the law.' " (internal quotations omitted) (emphasis added) (quoting *Davis v. United States*, 327 F.2d 301, 303 (9th Cir.1964))); *Brown v. State*, 392 So.2d 280, 284 (Fla.Dist.Ct.App.1980) (finding that police violated defendant's reasonable expectation of privacy when they entered defendant's driveway without a warrant at 1:45 a.m. and arrested him); *Cloutier*, 544 A.2d at 1280 (noting that "the implied invitation extends only to recognized access routes . . . and to *reasonable times of day*" (emphasis added)); *State v. Myers*, 117 Wash.2d 332, 815 P.2d 761, 769 (1991) (noting that whether a police officer enters a premises during the daylight hours is relevant in determining whether the scope of an implied invitation to enter premises has been exceeded).

Also, although law enforcement officers who "enter areas of the curtilage which are impliedly open" to the public are "free to keep their eyes open," *State v. Seagull*, 95 Wash.2d 898, 632 P.2d 44, 47 (1981), an officer who implements an overly intrusive means of investigation, such as the use of binoculars or other sensory-enhancing devices, may exceed the scope of the implied invitation. *See Cada*, 923 P.2d at 477 ("The scope of the implied invitation to enter areas of the curtilage that provide direct access to the house . . . may be exceeded where officers employ a

particularly intrusive method of viewing."); *Cloutier*, 544 A.2d at 1280 (holding that the defendant had no reasonable expectation of privacy in a marijuana plant where, *inter alia*, the officer "detected the contraband by means of his natural senses"). *But cf. State v. Lee*, 633 P.2d 48, 51 (Utah 1981) ("[T]he use of a flashlight to assist the natural vision at night does not make an 'observation' a 'search.' ").

Here, considering the totality of the circumstances, we conclude that Cox did not exceed the scope of the implied invitation to enter the premises and approach the front door of the Robinsons' home. Cox entered the driveway, began to drive toward the residence, and, *before* he reached the area of the driveway where the front walk intersects with the driveway, he saw the minors drinking in the Robinsons' backyard. At that point, Cox had gone no further than any member of the public would have gone in an attempt to contact the owners of the property. He did not stray from the "path" leading directly from the road to the front door (i.e., the driveway and the front sidewalk), nor did he attempt to conduct a general search of the premises through use of an overly intrusive means of investigation.

Also, although Cox entered the curtilage of the Robinsons' home at 11:00 p.m., a late hour of the evening, this entry did not necessarily exceed the scope of the implied invitation. "Under some circumstances, the mere fact that the intrusion was made late at night may be a factor suggesting that the police conduct was unduly intrusive." *State v. Morris*, 131 Idaho 562, 961 P.2d 653, 657 n. 3

(Ct.App.1998). Here, however, the lights along the Robinsons' front sidewalk and the lights on the front porch were still turned on. Also, multiple cars were parked along the driveway and on the public road in front of the house. These factors give rise to a reasonable inference that the implied invitation to approach the front door of the residence had not yet been rescinded for the night.[5] Also, we note that Cox drove up the driveway with his headlights turned on-the same way that any member of the general public would presumably have approached the house-rather than using subterfuge or the "cover of darkness" in an attempt to disguise his approach. *Compare Cada*, 923 P.2d at 478 (officers exceeded scope of implied invitation where they engaged in a "clandestine intrusion . . . under cover of darkness in the dead of night"), *with Clark*, 859 P.2d at 346 (officers did not exceed scope of implied invitation where the officers went to the front door of the residence at 10:00 p.m. to investigate a neighbor's complaint about a loud party).[6] Considering the totality of the circumstances, we conclude that, on the night in question, the implied invitation to enter

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5. This inference is supported by the fact that various members of the public had, in fact, approached the residence and "crashed" the party on the night in question.

6. *See also Morris*, 961 P.2d at 657 n. 3 (noting that the "late hour" was "not such a factor in this case," reasoning that "[i]f the investigation had been delayed until the next day, the [subject of the investigation] might have been gone"); *Ross*, 959 P.2d at 1191 (finding that the officers exceeded the scope of an implied invitation where "the officers arrived in an unmarked car, in plain clothes, after midnight, and made no attempt to contact [the defendant] or otherwise notify him of their presence").

the Robinsons' premises was still open even at this late hour, and Cox did not exceed the scope of this implied invitation when he drove up the Robinsons' driveway.

Moreover, Cox entered the curtilage of the Robinsons' home with the purpose of investigating reports of underage drinking at the residence. "[T]he investigation of an anonymous tip is clearly legitimate police activity so long as the investigation does not violate applicable constitutional provisions." *Divello v. State*, 782 N.E.2d 433, 437-38 (Ind.Ct.App.2003). Because Cox entered the premises to "investigate," he had a legitimate purpose for being present on the Robinsons' driveway at the time he viewed the illicit activity.

Also, we do not accept the Robinsons' argument that Cox's subjective intent indicates that the entry exceeded the scope of the implied invitation. Generally, the determination of whether a Fourth Amendment violation has occurred is based on " 'an objective assessment of the officer's actions . . . and not on the officer's state of mind at the time the challenged action was taken.' " *Limonja v. Commonwealth*, 8 Va.App. 532, 538, 383 S.E.2d 476, 480 (1989) (*en banc*) (quoting *Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 2782-83, 86 L.Ed.2d 370 (1985)). Although cases from other jurisdictions have inquired into the officer's subjective intent, we note that, in each of those cases, the officer's intent only became relevant if the officer exceeded the ordinary scope of the implied invitation by, for example, invading other areas of the curtilage *after* attempting a "knock and talk." *See, e.g., Estate*

of Smith v. Marasco, 318 F.3d 497, 520-21 (3d. Cir.2003) (remanding qualified immunity case for further factual determinations where the officers knocked on the front door, the defendant failed to answer, and the officers then entered the backyard of the residence); *Alvarez*, 147 F.3d at 357 (inquiring into officer's subjective purpose for entering the backyard where the officers, who were investigating an underage drinking party, approached the front door, noticed a sign that said "Party in Back," and then went to the backyard to "speak with the party's host").

Without expressly adopting or rejecting the rationale of these cases, we note that they are distinguishable because, here, Cox had not yet performed a "knock and talk," nor had he invaded any area of the curtilage beyond the "path" to the front door. Rather, when Cox viewed the illicit activity, he had not yet finished driving up the driveway. Under the circumstances of this case, then, there is no additional intrusion into the curtilage that would necessitate an inquiry into Cox's subjective intent. *Cf. McIntyre*, 860 P.2d at 302 (holding that "[t]he trial court's reliance on the officers' investigative purpose was misplaced" because " '[c]riminal investigation is as legitimate a societal purpose as is census taking or mail delivery' " (quoting *Corbett*, 516 P.2d at 490) (second alteration in original)).

Considering the totality of the circumstances, we therefore conclude that the Robinsons extended an implied invitation to the public to enter their driveway on the night of the party. We further conclude that,

when Cox entered the curtilage with the purpose of "investigating" the allegations of underage drinking, he did not exceed the scope of this implied invitation because, at the point in time when he viewed the illicit activity, he had gone no further than an ordinary member of the public would have gone in an attempt to contact the occupants of the property. Accordingly, because the Robinsons extended an implied invitation to enter the property, and because Cox did not exceed the scope of that invitation, the Robinsons had no reasonable expectation of privacy in the area of the driveway by the bush, and Cox's actions neither implicated nor violated the Fourth Amendment.

C. *Because the Fourth Amendment Does Not Apply, The Evidence Is Admissible*

The Robinsons submit that the trial court erred in its legal conclusion that Cox's observations were admissible pursuant to the plain view exception to the warrant requirement.[7] However, we need not reach the issue of whether the plain view *exception* applies because Cox's presence in the Robinsons' driveway did not implicate the Fourth Amendment. Rather, because the illicit conduct was clearly visible from an area in which the Robinsons had no

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7. In order for a search to come within the plain view exception, two requirements must be met: "(a) the officer must be lawfully in a position to view and seize the item, [and] (b) it must be immediately apparent to the officer that the item is evidence of a crime, contraband, or otherwise subject to seizure." *Hamlin v. Commonwealth*, 33 Va.App. 494, 502, 534 S.E.2d 363, 367 (2000) (citations omitted), *aff'd on reh'g en banc*, 35 Va.App. 375, 545 S.E.2d 556 (2001).

reasonable expectation of privacy, the plain view *doctrine* applies, and the observations are admissible.

That is, because the Robinsons had extended an implied invitation to the public to use the driveway to access the front door of their home, they had no reasonable expectation of privacy in that area. *See Clark*, 859 P.2d at 349 ("There is an implied invitation for the public to use access routes to the house . . . and there can be no reasonable expectation of privacy as to observations which can be made from such areas."); *Divello*, 782 N.E.2d at 437 ("[A]n individual does not have a reasonable expectation of privacy with regard to things or activities within a residence that may be observed by persons using their natural senses from places impliedly open to a visitor's entry."). And, because the Robinsons had no reasonable expectation of privacy in the illicit activities that were clearly visible from their driveway, the Fourth Amendment does not apply to any observations made by a police officer who was present in the driveway and complying with the terms of that implied invitation. *See Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983) ("If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause."); *see also Clark*, 859 P.2d at 348 ("[A] policeman's mere observation from a vantage point that does not infringe upon a privacy interest, of something open to public view, normally implicates no Fourth Amendment constraints because observation of items readily visible to the public is not a 'search.' "); *State v. Harris*, 919 S.W.2d 619, 624 (Tenn.Crim.App.1995) ("What an officer sees from a vantage point along

the walkway between the public road and the front door is not protected by [] the Fourth Amendment. . . ."). Because the Fourth Amendment does not apply, no warrant is required and, therefore, no exception to the warrant requirement is needed. *See generally Commonwealth v. Carelli*, 377 Pa.Super. 117, 546 A.2d 1185 (1988) ("Because there is no search, there is no need for an *exception* to permit admission of testimony relating to the observation." (emphasis in original)). Because Cox's observations do not implicate the Fourth Amendment, those observations are admissible in their entirety.

III. CONCLUSION

We hold that, under the facts of this case, the area of the driveway next to the bush is part of the curtilage of the Robinsons' home. We further hold, however, that the area was not protected by the Fourth Amendment because the Robinsons had no reasonable expectation of privacy in that area of the curtilage. Rather, because the Robinsons extended an implied invitation to members of the public to enter the portion of driveway before the walkway to the front door, Cox's presence on the driveway did not implicate the Fourth Amendment and, therefore, did not constitute an illegal search. Because Cox's observations did not implicate the Fourth Amendment, the trial court properly denied the Robinsons' *622 motions to suppress. Accordingly, we affirm the convictions.

Affirmed.

Appendix C

ANNUNZIATA, Judge, dissenting.

I concur in the majority's finding that Officer Cox entered the curtilage of the Robinson residence and that he conducted the challenged search from that vantage point. I write separately, however, because I do not agree that the search can be found constitutionally proper on the theory that the Robinsons had impliedly invited Officer Cox's entry, thereby extinguishing any reasonable expectation of privacy they had in the curtilage. Cox's sole and undisputed purpose for **766 entering the curtilage was to search for criminal activity. Consistent with the guarantees of the United States Constitution, it cannot be said that citizens impliedly extend an invitation to the police to enter their home or curtilage to conduct a search. On that ground, I would hold that Cox violated the Robinsons' rights under the Fourth Amendment.

"Curtilage" is defined as the "space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwelling." *Wellford v. Commonwealth*, 227 Va. 297, 302, 315 S.E.2d 235, 238 (1984) (internal citations omitted).

> The doctrine of curtilage is grounded in the peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home. The home is fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally

> feel free to express themselves in intimate ways. The potent individual privacy interests that inhere in living within a home expand into the areas that enclose the home as well. The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is not true simply in a mechanical sense because the areas are geographically proximate. It is true because people have both actual and reasonable expectations that many of the private experiences of home life often occur outside the house. Personal interactions, daily routines and intimate relationships revolve around the entire home place. There are compelling reasons, then, for applying Fourth Amendment protection to the entire dwelling area.

Dow Chemical Co. v. United States, 749 F.2d 307, 314 (6th Cir.1984), *aff'd*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).

Determining what constitutes curtilage is rooted in the specific facts of each case. *Jefferson v. Commonwealth*, 27 Va.App. 1, 16, 497 S.E.2d 474, 481 (1998). In determining whether the area in question constitutes curtilage, "particular reference" to the following four factors is helpful:

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which

> the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987); *see Jefferson*, 27 Va.App. at 16, 497 S.E.2d at 481.

Although the area in question was not enclosed by gate or fence, I concur that the place in the Robinsons' driveway from which Cox gathered the challenged evidence was within the curtilage.[8]

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8. The testimonial and photographic evidence reveal that a large bush, when viewed from the street, stands immediately in front of the walkway to the front door that intersects the driveway. The bush and walkway are but a few feet in front of the garage. Cox testified repeatedly that he was next to this bush in the driveway when he first saw the juveniles on the other side of the tree. Closer scrutiny of Cox's testimony reveals that, after driving his vehicle into the driveway, he continued moving down the driveway up to and past the bush that shielded the garage doors and the sidewalk leading to the front door from public view. According to his testimony, Cox was continuing his investigation into the curtilage as the nature of his observations and their implications of criminal activity became clearer.

At one point in his testimony, the following exchange took place:

> Q: And as you proceeded up the driveway further and further, the first thing you saw was [sic] persons who appeared to you to be young.
>
> A: Yes, sir.
>
> Q: Strike that. The first thing you saw was some activity.

(Cont'd)

Appendix C

(Cont'd)

A: Correct.

Q: And you kept moving. You never stopped.

A: That's correct.

Q: The second thing you saw was a couple of people that appeared to you to be underage; okay?

A: Yes, sir.

Q: And at or about the same time, you saw something in their-you saw long necked glass-white glass bottles in their hand.

A: Clear; yes, sir.

Q: And then you were some distance —

A: Still, yes.

Q: And you kept on going?

A: Yes, sir.

Q: And you kept on going because, although they appeared to be young and it might have been beer, your experience told you that you wouldn't know for sure until they ran when they saw you.

A: Not necessarily; when they-I didn't know what they were going to do. I wanted to identify them, to find out what their age was, and to see if it was alcohol.

Q: And you weren't able to do that from a distance. But when they dropped whatever it was, you could see the label; is that right?

A: That's correct.

Q: And they scattered. And that, in your mind, was telling.

A: Yes, sir.

(Cont'd)

Cox was located in close proximity to the house and in an area hidden from public view by an island of dense tree growth and a large bush just beyond. *See Dunn*, 480 U.S. at 301, 107 S.Ct. at 1140; *cf. Shaver v. Commonwealth*, 30 Va.App. 789, 797, 520 S.E.2d 393, 397 (1999) (holding that defendants had no reasonable expectation of privacy in an area that was not restricted from public view by means of a fence, shrubbery, or other barrier). In addition, the area was used for unloading groceries and washing cars, activities that are home-related and that evidence the "nature of the uses to which the area is put." *Dunn*, 480 U.S. at 301, 107 S.Ct. at 1140; *see* Vanessa Rownaghi, *Driving Into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy*, 11 Am. U.J. Gender Soc. Pol'y & L. 1165, 1181-82 (2003) (explaining that in addition to application of the *Dunn* factors, the essential inquiry that remains in determining what areas deserve Fourth Amendment protection is "whether the area harbors 'intimate activity associated with the sanctity of a man's home and the privacies of life' " (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886))).

(Cont'd)

> Q: Before that, it was maybe. After that, it was probable.
>
> A: Yes, sir.

This exchange demonstrates that Cox conducted a search into the driveway with his vehicle, continuing forward until he reached the bush that hides part of the driveway, the garage and the sidewalk to the front door, and proceeding until the alleged juveniles dropped the beer and scattered. Such conduct goes beyond the implied invitation that any citizen has to enter the driveway and approach the front door.

However, Cox's presence upon and search from the curtilage notwithstanding, the majority concludes that the Robinsons did not have a reasonable expectation of privacy in the area because Cox had an implied invitation to approach the house and talk to its occupants.[9] I disagree, not with the general principle underlying the conclusion, but with its applicability here under these facts and circumstances.

In *Shaver*, we addressed the theory of implied invitation, stating that " '[i]n the course of urban life, we have come to expect various members of the public to enter upon such a driveway, e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends.' " 30 Va.App. at 796, 520 S.E.2d at 397 (quoting *State v. Corbett*, 15 Or.App. 470, 516 P.2d 487, 490 (1973)). The implied invitation theory permitting entry into the curtilage of a home has been discussed and applied, either expressly or impliedly, in case law from several other jurisdictions. *See, e.g., In re Gregory S.*, 112 Cal.App.3d 764, 169 Cal.Rptr. 540, 546 (1980) (noting that resident has minimal, if any, expectation of privacy in area where public has been implicitly invited); *State v. Cada*, 129 Idaho 224, 923 P.2d 469, 477 (Ct.App.1996) (noting that "the direct access routes to the house, including parking areas,

9. The majority reasons that the police had an implied invitation to approach the Robinsons' front door because, in order to gain access to the door, they, like any visitor, would have to enter the curtilage and cross the area from which Cox observed individuals he believed to be juveniles drinking beer. Therefore, according to the majority, no Fourth Amendment violation occurred.

driveways and pathways to the entry, are areas to which the public is impliedly invited, and that police officers restricting their activity to such areas are permitted the same intrusion and the same level of observation as would be expected from a 'reasonably respectful citizen' "); *State v. Cloutier*, 544 A.2d 1277, 1280 (Me.1988) (noting that "the owner impliedly invites to intrude upon his or her property only those with a legitimate social or business purpose"); *People v. Kozlowski*, 69 N.Y.2d 761, 513 N.Y.S.2d 101, 505 N.E.2d 611, 612 (1987) (holding that, "[a]bsent evidence of intent to exclude the public, the entryway to a person's house offers implied permission to approach and knock on the front door"). Therefore, an officer of the law does not violate the Fourth Amendment if, in entering private property, the officer does nothing more than what a reasonably respectful citizen would do. *See State v. Dyreson*, 104 Wash.App. 703, 17 P.3d 668, 672 (2001); Mei Fung So, Annotation, *Search and Seizure: Reasonable Expectation of Privacy in Driveways*, 60 A.L.R. 5th 1 § 2a (1998 and Supp.2004).

It follows that, where the evidence establishes the police have entered the curtilage of a home without a warrant for the purpose of speaking to an occupant of the home, the entry is generally upheld. *See, e.g., Shaver*, 30 Va.App. at 793-94, 520 S.E.2d at 395 (noting that "investigators intended to speak with the defendants"); *Alvarez v. Montgomery County*, 147 F.3d 354, 358 (4th Cir.1998) (upholding officers' entry into the curtilage where they had a " 'legitimate reason' for entering the Alvarezes' property 'unconnected with a search of such

premises' " (quoting *United States v. Bradshaw*, 490 F.2d 1097, 1100 (4th Cir.1974))); *United States v. James*, 40 F.3d 850, 862 (7th Cir.1994) (finding that police did not violate the Fourth Amendment where they used a walkway, which was part of the curtilage of the home, "[i]n their attempt to reach the lower floor residents"); *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir.1990) (finding that police did not violate the Fourth Amendment where they observed a firearm through a kitchen window while attempting to contact the defendant homeowner and holding that a "policeman may lawfully go to a person's home to interview him"); *Kozlowski*, 513 N.Y.S.2d 101, 505 N.E.2d at 612 (noting that the "the officer walked up the driveway and onto an open-ended porch [and that h]e opened the screen door in order to knock on the front door"); *see generally Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582, 587 (2002) (stating that " 'there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's castle with the honest intent of asking questions of the occupant thereof whether the questioner be a pollster, a salesman, or an officer of the law' " (some internal quotations omitted) (quoting *Davis v. United States*, 327 F.2d 301, 303 (9th Cir.1964))).

That said, this case is manifestly not one that comes within the umbrella of implied invitation decisions. Cox made no attempt whatsoever to approach or knock on the front door of the Robinsons' home and speak to the occupants, nor did he testify

to any such intent.[10] Indeed, as discussed below, his testimony established that he was there to conduct a search. Thus, the theory of implied invitation upon which the majority relies for its rationale remains just that: a theoretical proposition of what Cox could have done, but not what he, in fact, did. The judicial decisions that invoke the implied invitation exception to the Fourth Amendment's requirement that a search be conducted pursuant to a warrant do not turn on such an abstract or hypothetical application of principles, wholly unmoored from the facts of the case. Absent an examination of the evidence showing the purpose underlying the police intrusion into constitutionally protected property, a court cannot determine whether the entry complied with constitutional mandates. As noted in *Rogers v. Pendleton*, 249 F.3d 279, 289 (4th Cir.2001), police officers have no right to enter upon curtilage to make an investigation based on reasonable suspicion. Instead, the right police officers have is

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10. When asked repeatedly if he entered the Robinsons' driveway with the intent to speak to an occupant of the house, the following exchange ensued:

> Q: Officer Cox, isn't it true that it was not your intent to walk to the front door and knock on it, as you proceeded up that driveway that night?
>
> A: My intent when I drove up the driveway was to establish probable cause, to investigate the scene further.

Furthermore, the evidence establishes that, consistent with his intent to "investigate the scene," Cox drove directly up the driveway until he came to a point where he could observe what he expected to find: juveniles in the act of drinking beer. *See* discussion *supra* note 8.

> the right to "knock and talk," that is, to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants, not the right to make a general investigation in the curtilage based on reasonable suspicion. A contrary rule would eviscerate the principle of *Oliver* and *Dunn* that the curtilage is entitled to the same level of Fourth Amendment protection as the home itself.

Id.[11] The Fourth Circuit underscored the same principle in *Bradshaw*, 490 F.2d at 1100, noting, after considering all the evidence bearing on the question, that an incursion into the curtilage of a rural home to speak to the occupants was lawful when "*unconnected with a search* of such premises *directed against the accused.*" *Id.* at 1104 (emphasis added).[12]

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11. In *Rogers*, the officer encountered the defendant homeowner in the front yard of his house. 249 F.3d at 284. The officer testified that after speaking with the defendant, who asked him to leave, the officer wanted to speak with someone "who was sober." *Id.* The officer then informed the defendant that he intended to conduct a search of the premises. *Id.* The court found these facts sufficient to show that the officer's intention was to search for evidence rather than to contact another homeowner. *Id.* at 287-90. Thus, any intrusion into the curtilage violated the Fourth Amendment's protections. *Id.*

12. In *Bradshaw*, the court held that the officer subsequently exceeded the "legitimate reason" for his visit when, without legally sufficient justification, he searched a vehicle near the residence. *Id.* at 1101. The court found that the officer's intent to conduct a search was evidenced by the

(Cont'd)

Appendix C

These cases demonstrate the importance of distinguishing between a police officer's right by implied invitation to "knock and talk," that is, to knock on a residence's door or otherwise approach the residence by implied invitation seeking to speak to the inhabitants, and a police officer's attempt to make a general investigation in the curtilage based on reasonable suspicion. Failing to make the distinction, as the *Rogers* court warned, would unconstitutionally "convert[ ] this limited license to do what any citizen may do—approach the house and speak to the inhabitant or owner—into a license to search for 'evidence.' " *Rogers*, 249 F.3d at 294.

An officer's purpose in entering the curtilage is thus a critical factor in determining whether police intrusion on private property falls within the property owner's implied invitation to the public. *See, e.g., id.* at 289; *Alvarez*, 147 F.3d at 358; *Bradshaw*, 490 F.2d at 1100; *see also Estate of Smith v. Marasco*, 318 F.3d 497, 520 (3d Cir.2003) ("Where officers are pursuing a lawful objective, *unconnected to any search for the fruits and instrumentalities of criminal activity*, their entry into the curtilage after not receiving an answer at the front door might be reasonable as entry into the curtilage may provide the only practicable way of attempting to contact the resident. . . ."(emphasis added)); *United States*

(Cont'd)
fact that while en route to the back door to speak with the occupant of the house, the officer strayed from his path to peer into the crack between the closed doors of a nearby parked vehicle. *Id.* This detour made clear that the officer's intent was no longer to seek to speak with the defendant. *Id.*

v. Hammett, 236 F.3d 1054, 1059 (9th Cir.2001) ("Law enforcement officers may encroach upon the curtilage of a home *for the purpose of asking questions of the occupants.*" (emphasis added)); *Daoust*, 916 F.2d at 758 ("A policeman may lawfully go to a person's home *to interview him.*" (emphasis added)); *cf. Lo-Ji Sales v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979) (rejecting the state's argument that store owners had no legitimate expectation of privacy in the items for sale in their store because "there is no basis for the notion that, because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees"); *see generally Lewis v. United States*, 385 U.S. 206, 211, 87 S.Ct. 424, 427, 17 L.Ed.2d 312 (1966) (explaining that undercover agents, "in the same manner as a private person, may accept an invitation to *630 do business and may enter upon the premises *for the very purposes* contemplated by the occupant" but that when entry is gained by invitation "an agent is [not] authorized to conduct a general search for incriminating materials" (emphasis added)).

The majority dismisses the import of these cases on the ground that Fourth Amendment inquiries are typically based on " 'an objective assessment of the officer's actions ... and not on the officer's state of mind at the time the challenged action was taken.' " *Limonja v. Commonwealth*, 8 Va.App. 532, 538, 383 S.E.2d 476, 480 (1989) (en banc) (quoting *Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 2783, 86 L.Ed.2d 370 (1985)). While the principle is sound, it has no applicability in cases involving a homeowner's implied invitation to enter

constitutionally protected property to contact the occupants of the home and, it appears, the principle has not been applied in such cases. Indeed, the very colloquialism used to refer to the exception, viz., "knock and talk," signifies subjective purpose as the effective analytical principle. Entry into the curtilage without a warrant to search is wholly incompatible with Fourth Amendment jurisprudence,[13] and judicial

13. The majority cites only two cases in support of its contention that an examination of the purpose underlying a police officer's entry onto the curtilage of private property is improper: *Marasco*, 318 F.3d 497, and *Alvarez*, 147 F.3d 354. A close reading of these cases establishes that neither supports the majority's conclusions. To the contrary, both decisions are rooted in an examination of the evidence establishing the police officer's subjective intent in entering the curtilage.

The court in *Marasco* found that where the police officers approached and knocked on the defendant's front door, and then telephoned his residence from the front door in an attempt to contact him, it was clear that the officers' purpose was to speak to the occupants in response to a complaint the police had received. *Marasco*, 318 F.3d at 520. Noting the lawfulness of that purpose, the Third Circuit then addressed whether, having received no answer to the knock at the front door, it was reasonable for the police to proceed to the backyard of the house and enter the garage. In reversing the trial court's grant of summary judgment, the Third Circuit determined that "there remain questions of fact as to whether the officers' intrusion into the curtilage was reasonable *in light of their asserted purpose in making their entry into Smith's property which was not to make a search.*" *Id.* at 521 (emphasis added). The court emphasized that, to be lawful, the police objective must be "unconnected to any search for the fruits and instrumentalities of criminal activity." *Id.* at 520.

Similarly, in *Alvarez*, the Fourth Circuit emphasized that the officers entered the Alvarezes' property " *simply* to notify

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the homeowner or the party's host about the complaint and to ask that no one drive while intoxicated." *Alvarez*, 147 F.3d at 358-59 (emphasis added). In reaching its decision, the court cited, with approval, other cases standing for the proposition that the purpose for which an officer enters the curtilage is a paramount consideration. *Id.* That consideration persists whether the court must determine the propriety of the initial intrusion by implied invitation or whether it must determine the lawfulness of intrusions beyond the front door of the house. The latter analysis is likewise predicated on the reasonableness of the intrusions beyond the front door, examined in *light of the officer's original purpose, viz, to interview the occupants.*

In short, both cases stand for the proposition that entry into curtilage must be independent from any intent or purpose on the part of the police to conduct a general search for evidence of criminal conduct. Logically, whether the purpose of an intrusion into curtilage is unconnected to a search for evidence necessarily involves an examination of the officer's subjective intent, as established by the testimony or the evidence of police conduct presented. *See supra* notes 11-12 (demonstrating that courts determine the purpose of an intrusion into curtilage by examining evidence of officers' subjective intent).

Consistent with the theory that an officer's purpose, or subjective intent, is a determinative factor in assessing reasonableness is the requirement applied by other Circuit Courts of Appeals that an officer act in "good faith" before moving from the front door to contact an occupant of a house. *See, e.g., Hammett*, 236 F.3d at 1060 ("[A police officer] may, in good faith, move away from the front door when seeking to contact the occupants."); *United States v. Raines*, 243 F.3d 419, 421 (8th Cir.2001) (holding that sheriff did not interfere with defendant's "privacy interest when he, in good faith, went unimpeded to the [rear of the home] to contact the occupants"). "Good faith" is defined, *inter alia*, as "[a] state of mind consisting in . . . honesty in belief or purpose." *Black's Law Dictionary* 713 (8th ed.2004).

(Cont'd)

validation of such a result under the aegis of an implied invitation rationale, applied in the abstract as suggested by the majority, "eviscerate[s] the principle of *Oliver* and *Dunn* that the curtilage is entitled to the same level of Fourth Amendment protection as the home itself." *Rogers*, 249 F.3d at 289.

In the instant case, not only is there no evidence that Cox was in the Robinsons' curtilage in order to go to their front door and speak to the occupants of the house, Cox's testimony makes clear that he entered the Robinsons' property in order to find evidence of a crime, viz., to surprise juveniles in the incriminating act of drinking beer and confirm his suspicion that the Robinsons were hosting an underage drinking party.[14] Under the facts of this case, it cannot be said that Cox's purpose was "unconnected with a search." *See Alvarez*, 147 F.3d at 358; *Bradshaw*, 490 F.2d at 1100. I would therefore hold that Cox's entry into the curtilage violated the Robinsons' reasonable expectation of privacy and their rights under the Fourth Amendment to the United States Constitution.

(Cont'd)

Thus, the case law clearly recognizes and requires an inquiry into an officer's subjective purpose for being on the curtilage of a home.

14. Cox testified that he "planned to enter the property to investigate the allegations of underage consumption of alcohol." In addition, when asked if he was "looking for a reaction of people scattering to confirm [his] suspicion that [he] had an underage drinking party," Cox responded affirmatively.

I would further hold that Cox's observations of criminal activity from his vantage point in the curtilage were not admissible pursuant to the plain view doctrine because, as discussed above, Cox's entry into the curtilage of the Robinsons' home was not lawful. *See Hamlin v. Commonwealth*, 33 Va.App. 494, 502, 534 S.E.2d 363, 367 (2000) (finding that in order for a search to come within the plain view exception, two requirements must be met: " '(a) the officer must be lawfully in a position to view and seize the item, [and] (b) it must be immediately apparent to the officer that the item is evidence of a crime, contraband, or otherwise subject to seizure' " (citations omitted)), *aff'd en banc*, 35 Va.App. 375 545 S.E.2d 556 (2001). Cox was not lawfully in a position to view the minors consuming alcohol. *See id.* Therefore, the trial court's admission of Cox's observations of juveniles drinking beer, which he made as a result of his illegal entry, cannot be affirmed on the ground that the evidence was in plain view.

For the reasons stated, I respectfully dissent.

APPENDIX D — PER CURIAM OPINION OF THE COURT OF APPEALS OF VIRGINIA DATED MAY 3, 2004

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 3rd day of May, 2004

Record No. 2539-03-2
Circuit Court Nos. 16,314, 16,317 through 16,321, 16,323, 16,328 and 16,329

George Fisher Robinson,

Appellant,

against

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Albemarle County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. Appellant contends the police came upon the curtilage of his home without a search warrant. Specifically, appellant argues the police were not authorized to progress on the driveway beyond the

garage and area adjacent to the backyard. "In reviewing a trial court's denial of a motion to suppress, '[t]he burden is upon [the defendant] to show that th[e] ruling, when the evidence is considered most favorably to the Commonwealth, constituted reversible error.'" *McGee v. Commonwealth*, 25 Va. App. 193, 197, 487 S.E.2d 259, 261 (1997) (*en banc*) (citation omitted). While we are bound to review *de novo* the ultimate questions of reasonable suspicion and probable cause, we "review findings of historical fact only for clear error[1] and . . . give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (footnote added).

> Subject to several well established exceptions, the Fourth Amendment prohibits warrantless searches of any place or thing in which a person has a justifiable expectation of privacy. To determine whether a citizen "enjoys a reasonable expectation of privacy . . . we consider whether he [or she] has exhibited an expectation of privacy in the object and whether that expectation is one that 'society is prepared to recognize as reasonable'"
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> However, where private lands are exposed to observation by members of the public who may legitimately come upon the property, a citizen does not reasonably have an

1. "In Virginia, questions of fact are binding on appeal unless 'plainly wrong.'" *McGee*, 25 Va. App. at 198 n.1, 487 S.E.2d at 261 n.1 (citations omitted).

> expectation of privacy in areas that the passing public can observe. Here, the defendants had no reasonable expectation of privacy in those areas of their property observable by members of the public who might approach their residence, pass by, or lawfully be upon their property.

Shaver v. Commonwealth, 30 Va. App. 789, 795-96, 520 S.E.2d 393, 396-97 (1999) (citations omitted).

> In the course of Urban life, we have come to expect various members of the public to enter upon such a driveway, e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends. Any one of them may be reasonably expected to report observations of criminal activity to the police. . . . If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so.

Id. at 796, 520 S.E.2d at 397 (citation omitted). "[W]hether a driveway is protected from entry by police officers varies from case to case and is dependant on whether the driveway is visible and accessible to the public. . . . [W]hether the driveway [is] within the curtilage of the house [is] not determinative." *Id.* at 796-97, 520 S.E.2d at 397 (citing *United States v. Smith*, 783 F.2d 648 (6th Cir. 1986) (holding not violation of Fourth Amendment when officer drove up seventy-five to one hundred

yards of private driveway that was unobstructed and open to public)).

Whether the driveway is considered to be curtilage is not determinative of the case. *Id.* Whether appellant had a reasonable expectation of privacy in the driveway is determinative of the case. *Id.* Appellant's driveway was visible from the street and was not gated or otherwise blocked from public access. Any salesperson, postal worker, neighbor, or other visitor could reasonably be expected to enter upon the driveway, including the police. At the section where the driveway reached the garage and area adjacent to the backyard, there was no gate or other indication to stop someone from continuing on the driveway. The bush at the corner of the garage and the lighted path to the front door were not indiciathat someone on the driveway should stop or otherwise discontinue their course on the driveway. There were no indications that appellant was exerting any expectation of privacy in the driveway at any point, including the area outside the garage and adjacent to the backyard, Thus, the officer did not need a search warrant to drive upon the driveway, including the area at the garage and into the area adjacent to the backyard. Accordingly, the trial court did not err by denying appellant's Motion to suppress the evidence.

II. Appellant argues the right to conduct a "knock and talk" investigation did not provide authority to continue on the driveway beyond the garage and area adjacent to the backyard. As we concluded above, the officer had the authority to continue on the driveway beyond the garage and area adjacent to the backyard because the driveway was open to public ingress and

egress without any show of an expectation of privacy in that area, Thus, we need not consider whether lie had authority to do so under a right to conduct a "knock and talk" investigation. Accordingly, the trial court did nor err by denying appellant's motion to suppress the evidence based on this argument.

III. Appellant asserts the plainview doctrine did not authorize the officer to enter the backyard, approach the back door, and seize evidence because no exigent circumstances existed to dispense with the search warrant requirement. "[I]n determining whether exigent circumstances were sufficient to overcome the presumption of unreasonableness and justify a warrantless entry, the court must examine the circumstances as they reasonably appeared to the law enforcement officers on the scene." *Verez v. Commonwealth,* 230 Va, 405, 411, 337 S.E.2d 749, 753 (1985). Some of the exigent circumstances that have been considered by the courts to be relevant include:

> (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others . . .; (4) information that the possessors of the contraband are aware that the police may be on their trail; . . . (7) whether there is at the time of entry a clear showing of probable cause; . . . (9) the likelihood of escape if the suspects are not swiftly apprehended . . . .

Id. at 410-11, 337 S.E.2d at 753 (citation omitted). The officer was faced with all of these exigent circumstances to varying degrees.

Appendix D

When the officer entered the yard he had probable cause to believe that juveniles were present and consuming alcohol. The officer could reasonably conclude that there were a number of guests based on the number of cars parked on the street and along the driveway. One of the juveniles he observed with a beer bottle had yelled to the other partygoers "Cops!" Thus, the others were aware that the police were on the scene. A number of juveniles began escaping into the wooded area, a situation that was potentially dangerous to these children who had been consuming alcohol. The officer was alone at the back of the house and other suspected juvenile drinkers could have escaped out the front door, taking with them evidence of the crimes being committed. Back-up officers who would have been able to help control the situation were half a mile away. Further, the officer was concerned that some of the evidence would be lost or destroyed: i.e. the alcohol, the bottles, and the fleeing, underage, drinkers to whose delinquency appellant was contributing. Faced with a rapidly changing crime scene, the officer reasonably perceived exigent circumstances that allowed him to enter the backyard and approach the back door to determine who was the host of the party serving alcohol to juveniles. Accordingly, the trial court did not err by denying appellant's motion to suppress the evidence.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a). If appellant files a demand for consideration by a three-judge panel, the demand should include a statement, not to exceed one typewritten page, identifying how this order is in error.

Appendix D

This Court's records reflect that Jonathan T. Wren, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste;
Cynthia L. McCoy, Clerk

By: s/ [illegible]
Deputy Clerk

APPENDIX E — PER CURIAM OPINION OF THE COURT OF APPEALS OF VIRGINIA DATED MAY 3, 2004

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 3rd day of May, 2004

Record No. 2539-03-2
Circuit Court Nos. 16,314, 16,317 through 16,321, 16,323, 16,328 and 16,329

Elisa Kenty Robinson,

Appellant,

against

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Albemarle County

Per Curiam

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garage and area adjacent to the backyard. "In reviewing a trial court's denial of a motion to suppress, '[t]he burden is upon [the defendant] to show that th[e] ruling, when the evidence is considered most favorably to the Commonwealth, constituted reversible error.'" *McGee v. Commonwealth*, 25 Va. App. 193, 197, 487 S.E.2d 259, 261 (1997) (*en banc*) (citation omitted). While we are bound to review *de novo* the ultimate questions of reasonable suspicion and probable cause, we "review findings of historical fact only for clear error[1] and . . . give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (footnote added).

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> (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others . . .; (4) information that the possessors of the contraband are aware that the police may be on their trail; . . . (7) whether there is at the time of entry a clear showing of probable cause; . . . (9) the likelihood of escape if the suspects are not swiftly apprehended . . . .

Id. at 410-11, 337 S.E.2d at 753 (citation omitted). The officer was faced with all of these exigent circumstances to varying degrees.

When the officer entered the yard he had probable cause to believe that juveniles were present and consuming alcohol. The officer could reasonably conclude that there were a number of guests based on the number of cars parked on the street and along the driveway. One of the juveniles he observed with a beer bottle had yelled to the other partygoers "Cops!" Thus, the others were aware that the police were on the scene. A number of juveniles began escaping into the wooded area, a situation that was potentially dangerous to these children who had been consuming alcohol. The officer was alone at the back of the house and other suspected juvenile drinkers could have escaped out the front door, taking with them evidence of the crimes being committed. Back-up officers who would have been able to help control the situation were half a mile away. Further, the officer was concerned that some of the evidence would be lost or destroyed: i.e. the alcohol, the bottles, and the fleeing, underage, drinkers to whose delinquency appellant was contributing. Faced with a rapidly changing crime scene, the officer reasonably perceived exigent circumstances that allowed him to enter the backyard and approach the back door to determine who was the host of the party serving alcohol to juveniles. Accordingly, the trial court did not err by denying appellant's motion to suppress the evidence.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a). If appellant files a demand for consideration by a three-judge panel, the demand should include a statement, not to exceed one typewritten page, identifying how this order is in error.

Appendix E

This Court's records reflect that Francis McQ. Lawrence, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste;
Cynthia L. McCoy, Clerk

By: s/ [illegible]
Deputy Clerk

APPENDIX F — JUDGE PAUL M. PEATROSS' LETTER OPINION DATED AUGUST 4, 2003

COMMONWEALTH OF VIRGINIA
Sixteenth Judicial Circuit

August 4, 2003

Jonathan T. Wren, Esquire
Martin & Raynor, P.C.
415 Fourth Street, N.E.
Charlottesville, Virginia 22902-4721

Francis McQ. Lawrence, Esquire
St. John, Bowling & Lawrence
416 Park Street
Charlottesville, Virginia 22902-4738

James L. Camblos, III, Esquire
Commonwealth's Attorney
County of Albemarle
410 East High Street
Charlottesville, Virginia 22902

RE: *Commonwealth v. George Robinson*
Commonwealth v. Eliza Robinson

Dear Counsel:

This matter comes before the Court on a Motion to Suppress filed by each defendant regarding the search and seizure of the premises owned by the parties at 4160 Bleak House Road in Albemarle County, Virginia. The Court took evidence on the motions on July 28, 2003, and took the matter under advisement to consult the legal authorities and briefs submitted.

Appendix F

FACTUAL FINDINGS

On August 16, 2002, Corporal Scott Cox went to 4160 Bleak House Road in Albemarle County following three telephone calls to the county police department reporting an alleged underage drinking party. Cox arrived at the residence at approximately 11:00 p.m. and observed 10 to 20 parked cars on the state road in front of the house. He planned to enter the property to investigate the allegations of underage consumption of alcohol. From the road he could see two to three parked cars on the left-hand side of the driveway. He entered the driveway and saw several other parked vehicles on the right side of the driveway. Straight ahead of him were several parked vehicles near the side of the house. As he drove up the driveway, he saw activity about 25 yards away that he explained to be people moving. Before he reached the point where the front walkway to the front door intersected with the driveway, he saw, by a pine tree seven to eight yards away, two individuals holding clear beer bottles. The individuals appeared to be under 18 years of age. Cox was in a marked police car with his headlights on. The two juveniles looked at him, looked at the house, yelled "cops," dropped the beer bottles, and ran down a fence line toward the woods.

Cox pulled his vehicle behind a car that was parked in the driveway and looked to his left. He saw juveniles running toward the woods. He could see a patio table covered with beer bottles and noticed beer bottles strewn about the backyard.

Cox exited his car, yelled for people to stop running, and radioed other officers who were waiting off the property that kids were running east into the woods.

Exhibits introduced by the Commonwealth show that the driveway is straight as it leaves the state road and then curves to the right of the house. The home is to the left of the driveway. There is a lighted walkway from the driveway to the front door that runs parallel to the house. Lights were on the front porch and lights were lighting the walkway. Upon entering the main driveway there is a circular paved driveway on the left as shown in Defendant's Exhibit #1.

As Cox went down the driveway, he could not see the backyard or the garage. He could see the house, the front yard, and the front porch. There were no signs posted indicating any information upon entering the driveway.

QUESTIONS PRESENTED

(1) Did the officer's entry by the driveway onto the Robinsons' property constitute entry into the Robinsons' curtilage and therefore implicate the Fourth Amendment?

(2) Is there a limited right to conduct a "knock and talk" investigation or did the officer reasonably observe alleged illegal activity from the driveway?

(3) Did the Commonwealth establish that the "plain view doctrine" applied byshowing that

(a) the officer was in a lawful place to plainly view the evidence, (b) that it was immediately apparent to the officer that the evidence in plain view was subject to seizure, (c) that the officer had a "lawful right of access" to seize items within the curtilage of the backyard?

DISCUSSION OF AUTHORITY

I. Fourth Amendment and Curtilage

Curtilage, which is made up of property surrounding the home, is usually protected under the Fourth Amendment from warrantless searches. "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Jefferson v. Commonwealth*, 27 Va. App. 1, 15-16 (1998), citing *California v. Ciraolo*, 476 U.S. 207, 212-213 (1986).

Curtilage is determined on a case-by-case factual basis under *United States v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987), which states four factors to consider: (1) the closeness of the area to the home, (2) whether the area is enclosed, (3) the use and purpose of the area, (4) steps taken by the resident to prevent observation of the area by people passing by. Relying on the facts presented in the case at issue, it is clear that the driveway, which is not fenced but is open to the public road, is the only way to arrive at the walkway to the front door of the house.

Appendix F

In determining whether the driveway is curtilage and should be protected under the Fourth Amendment, the Court refers to *Shaver v. Commonwealth*, 30 Va. App. 789, 796 (1999), which states that

> . . . [W]here private lands are exposed to observation by members of the public who may legitimately come upon the property, a citizen does not reasonably have an expectation of privacy in areas that the passing public can observe. *See Katz*, 389 U.S. [347,] 351, 88 S. Ct. 507 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.") Here, the defendant had no reasonable expectation of privacy in those areas of their property observable by members of the public who might approach their residence, pass by, or lawfully be upon their property... *See United States v. Ventling*, 678 F.2d 63, 66 (8th Cir. 1982) (finding that the defendant did not have a reasonable expectation of privacy in his driveway which was in public view). . .

Id. at 796. In addition, the court in *Shaver* quoted a Sixth Circuit case, *United States v. Smith*, 783 F.2d 648 (6th Cir. 1986), in which it was determined that whether police officers could lawfully enter a driveway must be decided on a case-by-case basis and is dependant on "whether the driveway is visible and accessible to the public." *Id.* at 650.

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Because the Robinsons' driveway is visible from the road, accessible to the public, and appears to be the appropriate way to approach the house, the Court finds that the Robinsons' driveway is not part of the curtilage of the home and Corporal Cox's presence there does not implicate the Fourth Amendment. However, as discussed later in this opinion, the backyard of the Robinsons' home is curtilage. Entry into the backyard by Cox required probable cause and exigent circumstances.

II. "Knock and Talk"

The Court finds that the facts in this case are consistent with precedential case law in which the courts have decided that an officer acted reasonably when he did not approach the front door of a house in conducting an investigation.

In *Commonwealth v. Swift*, 44 Va. Cir. 309 (1998), the Court held that a detective's discovery of a marijuana plant in the backyard of the defendant's house was unlawful because the detective was in the curtilage of the defendant's home without permission. The present case must be differentiated from *Swift* because Corporal Cox was lawfully in the driveway when he observed the alleged illegal activity at the Robinsons' home.

In *Bignelli v. Commonwealth*, 2001 Va. App. LEXIS 505 (2001), the court reasoned that since the trooper could observe people walking around the front yard with alcoholic beverages, it was reasonable of the trooper to walk into the yard to find the party's host. Since the yard was exposed to the public, the

court held that Bignelli had no expectation of privacy in that area. Similarly, Corporal Cox drove down the driveway, which is open to the public, and observed juveniles with beer bottles at the end of the driveway. He was in a lawful position to observe the alleged illegal activity.

In *Alvarez v. Montgomery County*, 147 F.3d 354 (4th Cir. 1998), at issue was another underage drinking party in which the court held that "[t]he textual 'touchstone of the Fourth Amendment is reasonableness.' . . . In line with this reasonableness approach, this circuit has permitted law enforcement officers to enter a person's backyard without a warrant when they have a legitimate law enforcement purpose for doing so." *Id.* at 358. In that case, the court decided that the officer acted reasonably when they entered the backyard "when circumstances indicated they might find the homeowner there." *Id.* In the present case, the facts show that Corporal Cox was reasonable in approaching the Robinsons' home by the driveway in response to three telephone calls indicating potential underage drinking at a party there and after the observation of 10-20 cars parked in front of the house. After he observed the juveniles with beer bottles at the end of the driveway, it was reasonable for him to think he had found the party.

In *Shaver v. Commonwealth*, 30 Va. App. 789 (1999), as stated above, the court reasoned that ". . . [i]f one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so." *Id.* at 796.

Appendix F

In *Rogers v. Pendleton*, 249 F.3d 279, 288 (2001), the officers arrived at a house reported to be hosting a party for underage drinkers with the legitimate purpose of speaking to the party's host. The officers found Mr. Rogers in the front yard who asked them to leave at which point the court held that they had no other legitimate reason for being on the property. The facts in *Rogers* are significantly different from the case at issue since the officers met and spoke with Mr. Rogers at the point they entered the property whereas in the current case, the officer did not meet the party's host until he was directed to the kitchen door at the back of the house by juveniles in the backyard.

III. "Plain View Doctrine"

As explained above, the Court finds that Corporal Cox was in a lawful place in the driveway when he plainly viewed two juveniles dropping clear beer bottles.

After observing the juveniles drop clear beer bottles, yell "cops," and run into the woods, the Court is satisfied that it would be immediately apparent to Corporal Cox that the evidence in plain view was subject to seizure.

In order for Cox to have a lawful right of access to seize items within the backyard, which constitutes curtilage, probable cause and exigent circumstances were required.

The Court finds that Cox had the requisite probable cause, which requires that an officer's

knowledge of the facts and circumstances are sufficient to justify a reasonable person to think an offense is being committed. *Brinegar v. United States,* 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1310-11, 93 L. Ed. 1879 (1949). Given the facts that there were three calls concerning the possibility of underage drinking at the Robinsons', the discovery of 10-20 cars parked in front of the home, and the observation of juveniles with clear beer bottles who dropped the bottles and ran after yelling "cops," the Court finds that a reasonable person would think the alleged offense was being committed.

The factors considered to determine whether exigent circumstances exist are (1) the time required to obtain warrant, (2) the ease or difficulty of defendant destroying evidence, (3) the likelihood of a third party destroying the evidence. Ronald J. Bacigal, *Virginia Criminal Procedure*§ 4-22 (4th ed., 1999). A warrant, even when there is time to obtain one, is not required if an emergency exists. Bacigal, *supra* § 4-22. In the present case, there was a high likelihood that the party would disperse quickly and evidence be destroyed once the juveniles or the Robinsons knew the police were on the property. In addition, persons not detained by Corporal Cox would be likely to destroy evidence of the party immediately. Therefore, the Court finds that exigent circumstances existed given the likelihood of evidence being destroyed and juveniles running away.

Appendix F

CONCLUSION

For the reasons stated above, the Motions to Suppress are denied.

Very truly yours,

s/ Paul M. Peatross
Paul M. Peatross, Judge

APPENDIX G — ORDER OF THE SUPREME COURT OF VIRGINIA DATED FEBRUARY 23, 2007 (Record No. 060417)

VIRGINIA:

In the Supreme Court of Virginia at the Supreme Court Building in the City of Richmond on Friday *the* 23rd *day of* February, 2007.

Record No. 060417
Court of Appeals No. 2474-03-2

Elisa K. Robinson,

Appellant,

against

Commonwealth of Virginia,

Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of Albemarle County.

Appendix G

Appellee's costs:

Printing brief	$200.00
Attorney's fee	50.00

A Copy,

Teste:

s/ [illegible]
Clerk

APPENDIX H — ORDER OF THE SUPREME COURT OF VIRGINIA DATED FEBRUARY 23, 2007 (Record No. 060426)

VIRGINIA:

In the Supreme Court of Virginia at the Supreme Court Building in the City of Richmond on Friday *the* 23rd *day of* February, 2007.

Record No. 060426
Court of Appeals No. 2539-03-2

George F. Robinson,

Appellant,

against

Commonwealth of Virginia,

Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of Albemarle County.

Appendix H

Appellee's costs:

Printing brief	$200.00
Attorney's fee	50.00

A Copy,

Teste:

s/ [illegible]
Clerk

APPENDIX I — PERTINENT CONSTITUTIONAL PROVISIONS

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.